AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(F)-75–10 OF 2019(W), 02(F)-90–11 OF 2019(W), 02(F)-97–12 OF 2019(W), 02(F)-05–01 OF 2020(W), 02(F)-08–01 OF 2020(B), 02(F)-30–07 OF 2020(K), 02(F)-41–08 OF 2020(W) AND 02(F)-28–04 OF 2021(W)
ABDUL RAHMAN SEBLI, HASNAH HASHIM AND RHODZARIAH BUJANG FCJJ
5 AUGUST 2022

Insurance — Accident insurance — Third party — Conflicting interests between insurer and third-party accident victim — Whether registration of vehicle imposed liability on insurer even though insured ceased to have insurable interest in motor vehicle at time of accident — Whether insurer was bound to serve cause papers relating to application for declaration pursuant to s 96(3) of the Road Transport Act 1987 ('RTA') on third-party claimant before third-party claimant obtained judgment against insured and tortfeasor — Whether High Court breached victim-appellant's right to equality enshrined in art 8 of Federal Constitution in allowing application under s 96(3) of RTA dependent on core issues for negligence which was yet to be determined by another forum — Whether High Court ought to dismiss application under s 96(3) of RTA on grounds that a separate tribunal was about to determine the issue by way of viva voce evidence — Whether application under s 96(3) of RTA could be used to determine core factual issues in tort of negligence — Whether insurer was bound by the Motor Insurance Bureau Guidelines which made insurers liable under policy for motor vehicles — Road Transport Act 1987 ss 91(1)(b), 94, 95, 96(1) & (3)

There were eight appeals in the present case related to the insurance law and dealt with the conflicting interests between the insurer and the third-party accident victims. The facts and issues in each of the appeals could be understood by perusing the leave questions of the appeals as set out by the court. The leave questions to be determined in the present case were as followed: (a) Appeal No 1, question 1 — whether the registration imposed liability on the insurer notwithstanding the insured ceased to have insurable interest in the motor vehicle, at the time of the accident; (b) Appeal No 2, question 1 — whether an insurer was bound to serve the cause papers relating to the application for a declaration pursuant to s 96(3) of the Road Transport Act 1987 ('the RTA') upon the third party claimant, every time that an insurer found it necessary to make the said application or such service was only required when the third party claimant had already obtained judgment against the insured/rider since by obtaining the said judgment the third party claimant had then obtained a legal interest as against the insurer; (c) Appeal No 2,

question 2 — whether the Court of Appeal was correct in law in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya binti Asbam) & Ors* [2016] MLJU 1317 ('Rasip bin Hamsudi') when it failed/refused to refer to the decision of another Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 ('Letchumanan') (although referred to it) and which judgment in *Letchumanan* held that whilst an insurer had a right to disclaim liability as against the insured for breach of policy conditions, whether the third party claimant's right as against the said insurer were protected by the third party claimant's rights in filing proceedings for the damages awarded against the said insured based on the third party claimant's vested right pursuant to s 96(1) of the RTA; (d) Appeal No 3, question 1 — whether the insurer was entitled to derive the benefit of their declaration obtained by them pursuant to s 96(3) of the RTA against the third party when they failed to comply with the proviso of the said provision; (e) Appeal No 4, question 1 — whether in allowing the s 96(3) application dependent on core issues for negligence which was yet to be determined by another forum (a trial court), the High Court breached the victim-appellant's right to equality enshrined in art 8 of the Federal Constitution; (f) Appeal No 4, question 2 — where an insurer's application under s 96(3) of the RTA turned on whether an insured (defendant) was ever involved in an accident as 'a matter of policy-or-law' should the High Court dismiss the application on the grounds that a separate tribunal was about to determine the issue by way of viva voce evidence; (g) Appeal No 4, question 3 — whether the s 96(3) application was only to determine the issue of 'voidness and unenforceability' of an insurance contract on the grounds of established contractual principles and were not to be exploited to determine the core factual issues in the tort of negligence which was a matter entirely outside the grounds contemplated by s 96(3) of the RTA; (h) Appeal No 5, question 3 — whether the definition of 'insurer concerned' of a vehicle was bound by the letter dated 18 January 1985 issued by the Motor Insurance Bureau ('MIB') given that the Principal Agreement dated 1968 had been replaced by the Substituted Agreement dated 1992; (i) Appeal No 6, question 1 — when the High Court had found as a fact that the third party claimant (the respondent) had made two separate applications to set aside the declaratory order obtained by the insurer against its insured and both the said applications had been dismissed by two different High Courts and that the defence filed by the third party claimant in the suit filed by the insurers for the injunction relied on the same facts on which the two applications were dismissed and there was no further appeal, whether the High Court was entitled in law to grant a permanent injunction against the third party claimant until he obtained judgment against the insurer; (j) Appeal No 6, question 2 — even though the High Court, having found that the insurer had not made out a case for malicious prosecution and abuse of process, but based on the imminent threat

by the third party claimant to execute against the insurer a public listed company, without first obtaining judgment against the insurer, whether the High Court was not entitled to grant the permanent injunction (quia timet) against the third party claimant, until he obtained the judgment against the insurer; (k) Appeal No 7, question 1 to question 6 — in relation to Appeal No 7, the issues raised in this appeal similar to those in Appeal No 2 and Appeal No 4; (l) Appeal No 8, question 1 — when the trial judge had found as a fact that based on the evidence led, a conspiracy to defraud the insurer had been made out as against the second respondent and the third respondent being the insured and the insured rider, and that the insurer possessed a defence on the merits of the fraud on the part of the insured/rider, whether the Court of Appeal was correct in law in rejecting the insurer's application for a declaration to declare the policy void and unenforceable; (m) Appeal No 8, question 2 — when the trial judge had found as a fact that the version of events as put forth by the insured rider as to how the accident occurred as being inherently incredible and inconsistent even with the testimony of the third party claimant, whether the Court of Appeal was correct in law in rejecting the insurer's application for a declaration to declare the policy void and unenforceable; and (n) Appeal No 8, question 5 — when the insured made a statutory declaration denying that he had lent his motorcycle to the rider at the material time nor that he knew the rider at the material time and subsequently made a second statutory declaration one month later in which he denied the contents of the first statutory declaration and when cogent evidence led by the adjuster who took him before the commissioner for oath to affirm the first statutory declaration, showed clearly that the first statutory declaration was made willingly and voluntarily, and that the second statutory declaration was affirmed to defraud the insurer, whether the Court of Appeal was correct in law in refusing to grant the declaratory order to declare the policy void and unenforceable on the basis of fraud on the part of the insured rider.

Held, dismissing Appeal Nos 1, 2, 5, 6, 7 and 8 with costs and allowing Appeal Nos 3 and 4 with costs:

(1) In relation to Appeal No 1, the court had not been shown which clause of the third-party risks insurance policy was the insured in breach of that rendered the policy null and void. The policy did not even contain a clause that required the insured to notify the insurer of the sale of the car. In addition, there was nothing in the RTA that could be construed to mean that a third-party risks insurance policy lapsed upon sale of the motor vehicle to a third party if otherwise the policy was valid and subsisting, ie had not expired at the time of the sale. Based on the above reasons, the court answered question 1 of Appeal No 1 in the affirmative, ie that the registration did impose liability on the insurer notwithstanding the fact that the insured ceased to have insurable interest in the motor vehicle at the time of the accident (see paras 13, 49 & 69).

(2) In respect of question 2 of Appeal No 2, the insurer in the case of *Letchumanan* relied on an exception to a liability clause in its insurance policy which stipulated that the insurer would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. This was an attempt to contract out of statute, which was prohibited by s 94 of the RTA. Further, there was no mention, let alone a discussion on s 96(3) of the RTA. The case of *Rasip bin Hamsudi* on the other hand dealt extensively with both s 96(1) and s 96(3) which were precisely the issues in the present appeal. The case of *Letchumanan* was therefore of no assistance to the appellant. The answer to leave question 2 of Appeal No 2 was therefore in the affirmative. At any rate there was no law that required the court to refer to every authority cited by counsel in submissions (see paras 89–90).

(3) The court's answer to question 1 of Appeal No 2 was that the insurer was bound to serve the cause papers relating to the application for a declaration pursuant to s 96(3) of the RTA on the third-party claimant before the third-party claimant obtained judgment against the insured and the tortfeasor. In the present case, neither the notice nor the cause papers for the s 96(3) application were served on the respondent by the first appellant, in breach of the proviso to s 96(3), which made the first appellant's repudiation of the insurance policy based on the declaration order it obtained from the High Court unsustainable in law. Further, following this finding, the court answered question 1 of Appeal No 3 in the negative, that was to say, the insurer was not entitled to the benefit of the declaration order it obtained under s 96(3) when it failed to comply with the proviso to the section (see paras 106–107 & 109).

(4) In respect of question 1 of Appeal No 4, fairness to the third-party victim demanded that the evidence relied on by the first respondent in the s 96(3) application be tested in the pending trial at the sessions court. The arbitrariness that had taken place had created uncertainty for the victim's chances of recovery and this breached his right to equality under art 8 of the Federal Constitution as the fate of the entire case was decided not in a trial but on an originating summons. What transpired in this case had resulted in the trial court's function being rendered useless and its judgment in favour of the victim nugatory as the s 96(3) declaration obtained by the first respondent from the High Court defeated the judgment obtained by the victim from the sessions court, thus leaving him with only a paper judgment that may not even be worth the paper it was printed on. That defeated the object of the RTA to protect third parties against risks arising out of the use of motor vehicles rather than to put its object into effect. Based on the above reasons, the court answered the leave question in the affirmative (see paras 164–165 & 172).

(5) The court answered leave question 2 of Appeal No 4 in the affirmative to prevent two courts of competent jurisdiction from making conflicting findings of fact on the same issue. Evidence of the alleged non-involvement of the third respondent in the accident must be adduced at the trial to prevent duplicity of proceedings. As for leave question 3 of Appeal No 4, the answer must likewise be in the affirmative as a s 96(3) application was only for determining issues of voidness and unenforceability of an insurance contract and not to determine core issues in the tort of negligence (see para 172).

(6) The court answered leave question 3 of Appeal No 5 in the affirmative. The appellant was bound by the MIB guidelines vide letter dated 18 January 1985 which made insurers liable under the policy for motor vehicles. The appellant was therefore liable under the insurance policy for the respondent's car as all insurers for motor insurance were signatories to the Substituted Domestic Agreement with the MIB guidelines. Even assuming for a moment that there was a breach of policy conditions by the insured for failing to inform the appellant of the sale of the car, the appellant could not deny liability by virtue of the statutory requirement under s 91(1)(b) read with ss 94 and 95 of the RTA (see paras 184, 187 & 189).

(7) The question of the appellant's entitlement to a permanent injunction in the manner it was raised in the two leave questions in Appeal No 6 did not arise as it was not even sought for by the appellant. The two leave questions were therefore misconceived as they were based on an order that was erroneously made by the High Court. The court had no jurisdiction to make an order that was not sought for by the litigant. Further, the court had decided in Appeal No 2 that there was no necessity for a third-party claimant (in this case the respondent) who had obtained judgment from the trial court against the insured to obtain another judgment against the insurer (in this case the appellant) before the third-party claimant could enforce the trial court's judgment against the insured. Therefore, the question of the appellant's entitlement to an injunction, quia timet or permanent against the respondent did not arise. Based on the above findings, the court answered the two leave questions in Appeal No 6 in the negative (see paras 216 & 218).

(8) In relation to Appeal No 8, the leave questions were fact centric. The answers to the questions would depend on proved facts where all relevant evidence had been placed before the court. The court found that there was absolutely nothing novel in any of the questions that required determination by the court. As such, it was not necessary for the court to answer leave questions 1, 2 and 5 of Appeal No 8. Even if the court was minded to answer the questions, the answers would not be favourable to the appellant as there was a subsisting judgment obtained by the

respondent against the insured from the Shah Alam Sessions Court, which had not been set aside. In addition to that, the Court of Appeal had set aside the declaratory order obtained by the appellant from the High Court dated and maintained the decision on liability and quantum against the insured (see paras 259–260).

[Bahasa Malaysia summary

Terdapat lapan rayuan dalam kes semasa yang berkaitan dengan undang-undang insurans dan menangani percanggahan kepentingan antara penanggung insurans dan mangsa kemalangan pihak ketiga. Fakta dan isu dalam setiap rayuan boleh difahami dengan meneliti persoalan kebenaran rayuan seperti yang ditetapkan oleh mahkamah. Persoalan kebenaran yang akan ditentukan dalam kes semasa adalah seperti berikut: (a) Rayuan No 1, persoalan 1 — sama ada pendaftaran akan mengenakan liabiliti ke atas penanggung insurans walaupun pengambil insurans tidak lagi mempunyai kepentingan boleh insurans dalam kenderaan bermotor, pada masa kemalangan tersebut; (b) Rayuan No 2, persoalan 1 — sama ada penanggung insurans terikat untuk menyampaikan kertas kausa berkaitan permohonan untuk satu deklarasi menurut s 96(3) Akta Pengangkutan Jalan 1987 ('RTA') ke atas penuntut pihak ketiga, setiap kali penanggung insurans mendapati terdapat keperluan untuk membuat permohonan tersebut atau penyampaian tersebut hanya perlu apabila penuntut pihak ketiga telah memperoleh penghakiman terhadap pengambil insurans/penunggang memandangkan dengan memperolehi penghakiman tersebut penuntut pihak ketiga kemudiannya memperoleh kepentingan undang-undang terhadap penanggung insurans; (c) Rayuan No 2, persoalan 2 — sama ada Mahkamah Rayuan telah tepat dari segi undang-undang dalam Pacific & Orient Insurance Co Berhad lwn *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya binti Asbam) & Ors* [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659 ('Rasip bin Hamsudi') apabila ia gagal/enggan merujuk kepada keputusan Mahkamah Rayuan lain dalam *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 ('Letchumanan') (walaupun dirujuk kepadanya) dan yang mana penghakiman dalam *Letchumanan* memutuskan bahawa walaupun penanggung insurans mempunyai hak untuk menafikan liabiliti terhadap pihak yang diinsuranskan kerana melanggar syarat polisi, sama ada hak penuntut pihak ketiga terhadap penanggung insurans tersebut dilindungi oleh hak penuntut pihak ketiga dalam memfailkan prosiding untuk ganti rugi yang diawardkan terhadap pengambil insurans tersebut berdasarkan hak penuntut pihak ketiga menurut s 96(1) RTA; (d) Rayuan No 3, persoalan 1 — sama ada penanggung insurans berhak menggunapakai manfaat deklarasi mereka yang diperolehi oleh mereka menurut s 96(3) RTA terhadap pihak ketiga apabila mereka gagal mematuhi proviso peruntukan tersebut; (e) Rayuan No 4,

A persoalan 1 — sama ada dalam membenarkan permohonan s 96(3) bergantung kepada isu teras atas kecuaian yang masih belum ditentukan oleh forum lain (mahkamah perbicaraan), Mahkamah Tinggi telah melanggar hak merayu mangsa bagi kesamarataan yang termaktub dalam perkara 8 Perlembagaan Persekutuan; (f) Rayuan No 4, persoalan 2 — apabila B permohonan penanggung insurans di bawah s 96(3) RTA dibangkitkan sama ada orang yang diinsuranskan (defendan) pernah terlibat dalam kemalangan sebagai 'perkara polisi atau undang-undang' haruskah Mahkamah Tinggi menolak permohonan tersebut atas alasan bahawa tribunal berasingan akan menentukan isu tersebut melalui keterangan viva voce; (g) Rayuan No 4, C persoalan 3 — sama ada permohonan s 96(3) hanya untuk menentukan isu 'ketidakesahan dan tidak boleh dikuatkuasakan' kontrak insurans atas alasan prinsip kontrak yang ditetapkan dan tidak boleh dieksploitasi untuk menentukan isu fakta teras dalam tort kecuaian yang merupakan perkara yang sepenuhnya di luar alasan yang dipertimbangkan oleh s 96(3) RTA; (h) Rayuan D No 5, persoalan 3 — sama ada definisi 'pengambil insurans berkenaan' sesuatu kenderaan terikat dengan surat bertarikh 18 Januari 1985 yang dikeluarkan oleh Biro Insurans Motor ('MIB') memandangkan Perjanjian Utama bertarikh 1968 telah telah digantikan dengan Perjanjian Penggantian bertarikh 1992; (i) Rayuan No 6, persoalan 1 — apabila Mahkamah Tinggi mendapati pada E fakta bahawa penuntut pihak ketiga (responden) telah membuat dua permohonan berasingan untuk mengenepikan perintah deklarasi yang diperoleh oleh penanggung insurans terhadap pihak yang diinsuranskan dan kedua-dua permohonan tersebut telah ditolak oleh dua Mahkamah Tinggi yang berbeza dan bahawa pembelaan yang difailkan oleh penuntut pihak F ketiga dalam tindakan yang difailkan oleh penanggung insurans untuk injunksi bergantung pada fakta yang sama di mana kedua-dua permohonan tersebut telah ditolak dan tiada rayuan lanjut, sama ada Mahkamah Tinggi berhak di sisi undang-undang untuk memberikan injunksi kekal terhadap penuntut pihak ketiga sehingga beliau mendapat penghakiman terhadap G penanggung insurans; (j) Rayuan No 6, persoalan 2 — walaupun Mahkamah Tinggi, setelah mendapati bahawa penanggung insurans tidak membuktikan kes untuk pendakwaan berniat jahat dan penyalahgunaan proses, tetapi berdasarkan tentangan oleh penuntut pihak ketiga untuk perlaksanaan terhadap penanggung insurans syarikat tersenarai awam, tanpa terlebih dahulu H mendapatkan penghakiman terhadap penanggung insurans, sama ada Mahkamah Tinggi tidak berhak untuk memberikan injunksi kekal (quia timet) terhadap penuntut pihak ketiga, sehingga beliau memperolehi penghakiman terhadap penanggung insurans; (k) Rayuan No 7, persoalan 1 hingga soalan 6 — berkaitan dengan Rayuan No 7, isu-isu yang dibangkitkan dalam rayuan ini I sama seperti dalam Rayuan No 2 dan Rayuan No 4; (l) Rayuan No 8, persoalan 1 — apabila hakim perbicaraan mendapati atas fakta bahawa berdasarkan keterangan yang dibawa, satu konspirasi untuk menipu penanggung insurans telah dibuktikan terhadap responden kedua dan responden ketiga sebagai pihak yang diinsuranskan dan penunggan yang diinsuranskan, dan bahawa

penanggung insurans mempunyai pembelaan pada merit atas penipuan di pihak pengambil insurans/penunggang, sama ada Mahkamah Rayuan adalah betul di sisi undang-undang dalam menolak permohonan penanggung insurans untuk satu deklarasi bahawa polisi tersebut adalah tidak sah dan tidak boleh dikuatkuasakan; (m) Rayuan No 8, persoalan 2 — apabila hakim perbicaraan mendapati pada fakta bahawa versi peristiwa yang dikemukakan oleh penunggang yang diinsuranskan tentang bagaimana kemalangan tersebut berlaku sebagai tidak boleh dipercayai dan tidak konsisten walaupun dengan keterangan penuntut pihak ketiga, sama ada Mahkamah Rayuan telah dengan tepat di sisi undang-undang dalam menolak permohonan penanggung insurans untuk deklarasi bahawa polisi tersebut tidak sah dan tidak boleh dikuatkuasakan; dan (n) Rayuan No 8, persoalan 5 — apabila pengambil insurans membuat akuan berkanun menafikan bahawa beliau telah meminjamkan motosikalnya kepada penunggang pada masa material dan juga bahawa beliau mengenali penunggang tersebut pada masa material dan kemudiannya membuat akuan berkanun kedua satu bulan kemudian di mana beliau menafikan kandungan akuan berkanun pertama dan apabila keterangan kukuh yang dikemukakan oleh penilai yang membawanya ke hadapan pesuruhjaya sumpah untuk mengikrarkan akuan berkanun pertama, menunjukkan dengan jelas bahawa akuan berkanun pertama dibuat dengan secara rela dan sanggup, dan bahawa akuan berkanun kedua telah diikrarkan untuk menipu penanggung insurans, sama ada Mahkamah Rayuan telah dengan tepat dari segi undang-undang dalam menolak untuk memberikan perintah deklarasi bahawa polisi tersebut tidak sah dan tidak boleh dikuatkuasakan atas dasar penipuan di pihak penunggang yang diinsuranskan.

Diputuskan, menolak Rayuan No 1, 2, 5, 6, 7 dan 8 dengan kos dan membenarkan Rayuan No 3 dan 4 dengan kos:

(1) Berhubung dengan Rayuan No 1, mahkamah tidak ditunjukkan klausa polisi insurans risiko pihak ketiga yang mana diinsuranskan telah dilanggar yang menyebabkan polisi tersebut terbatal dan tidak sah. Polisi tersebut tidak mengandungi klausa yang menghendaki pengambil insurans untuk memaklumkan penanggung insurans tentang penjualan kereta tersebut. Di samping itu, tiada apa-apa dalam RTA yang boleh ditafsirkan bagi membawa maksud bahawa polisi insurans risiko pihak ketiga luput apabila kenderaan bermotor tersebut dijual kepada pihak ketiga sebaliknya polisi tersebut sah dan wujud, iaitu belum tamat tempoh pada masa penjualan. Berdasarkan alasan di atas, mahkamah menjawab persoalan 1 Rayuan No 1 secara afirmatif, iaitu pendaftaran tersebut sebenarnya mengenakan liabiliti ke atas penanggung insurans walaupun fakta bahawa pengambil insurans tidak lagi mempunyai kepentingan boleh insurans dalam kenderaan bermotor pada masa kemalangan (lihat perenggan 13, 49 & 69).

(2) Berkenaan dengan persoalan 2 Rayuan No 2, penanggung insurans

dalam kes *Letchumanan* bergantung pada pengecualian kepada klausa liabiliti dalam polisi insuransnya yang menetapkan bahawa penanggung insurans tidak akan bertanggungjawab ke atas kematian atau kecederaan badan kepada mana-mana orang 'selain penumpang yang dibawa bagi tujuan atau menurut kontrak pekerjaan'. Ini adalah percubaan untuk membuat kontrak di luar statut, yang dilarang oleh s 94 RTA. Selanjutnya, tidak disebut, apatah lagi perbincangan mengenai s 96(3) RTA. Kes *Rasip bin Hamsudi* sebaliknya banyak menangani kedua-dua s 96(1) dan s 96(3) yang merupakan isu dalam rayuan semasa. Oleh itu, kes *Letchumanan* tidak membantu perayu. Oleh itu, jawapan untuk persoalan kebenaran 2 Rayuan No 2 adalah afirmatif. Bagaimanapun, tiada undang-undang yang menghendaki mahkamah merujuk kepada setiap otoriti yang dikemukakan oleh peguam dalam penghujahan (lihat perenggan 89–90).

(3) Jawapan mahkamah kepada persoalan 1 Rayuan No 2 adalah penanggung insurans terikat untuk menyampaikan kertas kausa berkaitan permohonan untuk satu deklarasi menurut s 96(3) RTA ke atas penuntut pihak ketiga sebelum penuntut pihak ketiga mendapat penghakiman terhadap pengambil insurans dan pelaku tort. Dalam kes semasa, tiada notis mahupun kertas kausa bagi permohonan s 96(3) disampaikan kepada responden oleh perayu pertama, yang melanggar proviso s 96(3), yang menjadikan penolakanperayu pertama terhadap polisi insurans berdasarkan perintah deklarasi yang diperolehi daripada Mahkamah Tinggi yang tidak dapat dipertahankan dari segi undang-undang. Selanjutnya, berdasarkan dapatan ini, mahkamah menjawab persoalan 1 Rayuan No 3 secara negatif, iaitu, penanggung insurans tidak berhak mendapat manfaat daripada perintah deklarasi yang diperolehnya di bawah s 96(3) apabila ia gagal mematuhi proviso seksyen tersebut (lihat perenggan 106–107 & 109).

(4) Berkenaan dengan persoalan 1 Rayuan No 4, keadilan kepada mangsa pihak ketiga menyarankan supaya keterangan yang digunapakai oleh responden pertama dalam permohonan s 96(3) dibicarakan dalam perbicaraan yang belum selesai di mahkamah sesyen. Ketiadaan pertimbangan yang telah berlaku telah menimbulkan ketidakpastian untuk peluang mangsa mendapatkan semula dan ini melanggar haknya untuk kesamarataan di bawah perkara 8 Perlembagaan Persekutuan kerana penentuan keseluruhan kes diputuskan bukan dalam perbicaraan tetapi atas saman pemula. Apa yang berlaku dalam kes ini telah menyebabkan fungsi mahkamah perbicaraan menjadi tidak berguna dan penghakimannya yang memihak kepada mangsa tidak terpakai kerana deklarasi s 96(3) yang diperolehi oleh responden pertama dari Mahkamah Tinggi mengatasi penghakiman yang diperoleh mangsa daripada mahkamah sesyen, justeru meninggalkannya dengan hanya kertas penghakiman yang mungkin tidak senilai dengan kertas yang

dicetak atasnya. Ini mengalahkan tujuan RTA untuk melindungi pihak ketiga daripada risiko yang timbul daripada penggunaan kenderaan bermotor dan bukannya melaksanakan tujuannya. Berdasarkan alasan di atas, mahkamah menjawab persoalan kebenaran secara afirmatif (lihat perenggan 164–165 & 172).

(5) Mahkamah menjawab persoalan 2 Rayuan No 4 dengan afirmatif untuk menghalang dua mahkamah yang mempunyai bidang kuasa kompeten daripada membuat dapatan fakta yang bercanggah mengenai isu yang sama. Keterangan mengenai dakwaan ketiadaan penglibatan responden ketiga dalam kemalangan tersebut harus dikemukakan pada perbicaraan untuk mengelakkan pertindihan prosiding. Bagi persoalan kebenaran 3 Rayuan No 4, jawapannya juga mestilah secara afirmatif kerana permohonan s 96(3) hanya untuk menentukan isu ketidaksahan dan ketidakbolehkuatkuasaan kontrak insurans dan bukan untuk menentukan isu teras dalam tort kecuaian (lihat perenggan 172).

(6) Mahkamah menjawab persoalan 3 Rayuan No 5 dengan afirmatif. Perayu telah terikat dengan garis panduan MIB melalui surat bertarikh bertarikh 18 Januari 1985 yang menjadikan penanggung insurans bertanggungjawab di bawah polisi untuk kenderaan bermotor. Oleh itu, perayu bertanggungjawab di bawah polisi insurans untuk kereta responden kerana kesemua penanggung insurans untuk insurans bermotor adalah penandatangan kepada Perjanjian Penggantian Domestik dengan garis panduan MIB. Walaupun dengan mengandaikan seketika bahawa terdapat pelanggaran syarat polisi oleh pihak yang diinsuranskan kerana gagal memaklumkan kepada perayu tentang penjualan kereta tersebut, perayu tidak boleh menafikan liabiliti berdasarkan keperluan statutori di bawah s 91(1)(b) dibaca dengan ss 94 dan 95 RTA (lihat perenggan 184, 187 & 189).

(7) Persoalan tentang kelayakan perayu untuk mendapatkan injunksi kekal mengikut cara ianya dibangkitkan dalam dua persoalan kebenaran dalam Rayuan No 6 tidak timbul kerana ia tidak dimohong oleh perayu. Kedua-dua persoalan kebenaran tersebut disalah anggap kerana ia berdasarkan perintah yang dibuat secara khilaf oleh Mahkamah Tinggi. Mahkamah tidak mempunyai bidang kuasa untuk membuat perintah yang tidak dimohon oleh penuntut. Selanjutnya, mahkamah telah memutuskan dalam Rayuan No 2 bahawa tidak ada keperluan untuk penuntut pihak ketiga (dalam kes ini responden) yang telah mendapat penghakiman daripada mahkamah perbicaraan terhadap pengambil insurans untuk mendapatkan penghakiman lain terhadap penanggung insurans (dalam ini kes perayu) sebelum penuntut pihak ketiga boleh menguatkuasakan penghakiman mahkamah perbicaraan terhadap pengambil insurans. Oleh itu, persoalan tentang hak perayu terhadap injunksi, quia timet atau kekal terhadap responden tidak timbul.

Berdasarkan dapatan di atas, mahkamah menjawab dua persoalan kebenaran dalam Rayuan No 6 secara negatif (lihat perenggan 216 & 218).

(8) Berhubung dengan Rayuan No 8, persoalan kebenaran adalah berpaksikan fakta. Jawapan kepada persoalan tersebut akan bergantung kepada fakta yang telah dibuktikan di mana semua keterangan yang berkaitan telah dikemukakan di hadapan mahkamah. Mahkamah mendapati bahawa tiada perkara baru dalam mana-mana persoalan yang memerlukan dapatan oleh mahkamah. Oleh itu, mahkamah tidak perlu menjawab persoalan kebenaran 1, 2 dan 5 Rayuan No 8. Walaupun mahkamah berhasrat untuk menjawab persoalan-persoalan tersebut, jawapannya tidak akan memihak kepada perayu kerana wujudnya penghakiman yang diperoleh responden terhadap pengambil insurnas daripada Mahkamah Sesyen Shah Alam, yang tidak diketepikan. Di samping itu, Mahkamah Rayuan telah mengetepikan perintah deklarasi yang diperolehi oleh perayu daripada Mahkamah Tinggi bertarikh dan mengekalkan keputusan mengenai liabiliti dan kuantum terhadap pengambil insurans (lihat perenggan 259–260).]

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& Assoc) in Civil Appeal No 02(f)-90–11 of 2019(W) for the appellants.
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GK Ganesan (with BP Jayaprathap, KN Geetha, GS Saran and JD Prabh Singh) (Jayaprathap & Rakan-rakan) in Civil Appeal No 02(i)-5–01 of 2020(W) for the appellant.
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Kamalanathan Ratnam (with Vinod a/l R Kamalanathan) (Vinod Kamalanathan & Assoc) in Civil Appeal Nos 02(f)-30–07 of 2020(K), 02(f)-41–08 of 2021 and 02(f)-28–04 of 2021(W) for the appellant.
Vignesh Kumar Krishnasamy (with R Ganavathy Naidu and Muhamad Afiq bin Abu Bakar) (Balendran Chong) in Civil Appeal No 02(f)-75–10 of 2019(W) for the first respondent.
Unrepresented for the second and third respondents in Civil Appeal No 02(f)-75–10 of 2019(W).
Ravichanthiran a/l Ganesan (with Aida bt Hassan) (T Rajagopalu & Co) in Civil Appeal No 02(f)-90–11 of 2019(W) for the respondent.
Kamalanathan Ratnam (with Vinod a/l R Kamalanathan) (Vinod Kamalanathan & Assoc) in Civil Appeal No 02(f)-97–12 of 2019(W) for the respondent.
Ratha Davi a/p Rada Krisnan (SG Lingam & Co) in Civil Appeal No 02(i)-5–01 of 2020(W) for the first respondent.
VK Dasaratharaj Pillai (with Aniza Sultan) (VK Raj & Bavani) in Civil Appeal No 02(i)-5–01 of 2020(W) for the second and third respondent.
Harjeet Singh Sidhu (PS Sohanpal & Sindhu) in Civil Appeal No 02(f)-8–01 of 2020(B) for the respondent.
Rajan Ayappan a/l Veerasamy (with Prakash a/l Ramadas and Nurul Farahusna bt Razak) (Manoveera & Co) in Civil Appeal No 02(f)-30–07 of 2020(K) for the respondent.
Manoharan a/l Veerasamy, Prakash a/l Ramadas, Nurul Farahusna Bintl Razak and Rajan a/l Ayappan (Manoveera & Co) for the respondent.
Kandiah Chelliah (with Kenneshawaran Kandiah) (Manikam Avadiar & Co) in Civil Appeal No 02(f)-41–08 of 2020 for the respondent.
Ravichanthiran a/l Ganesan (with Aida bt Hassan) (G Ravi) in Civil Appeal No 02(f)-28–04 of 2021(W) for the respondent.

Abdul Rahman Sebli FCJ:

[1] There were eight appeals heard together before us, namely:

(a) Appeal No 02(F)-75–10 of 2019(W) between *Amgeneral Insurance Bhd v Sa' Amran a/l Atan & 2 Ors*;

(b) Appeal No 02(F)-90–11 of 2019(W) between *Pacific & Orient Insurance Co Bhd v Mohamad Rafiq Muiz bin Ahmad Hanipah*;

(c) Appeal No 02(F)-97–12 of 2019(W) between *Jesudas a/l Palanisamy v Pacific & Orient Insurance Co Bhd*;

(d) Appeal No 02(F)-05–01 of 2020(W) between *Mohamad Zulkarnain bin Mustafa v Allianz General Insurance Company (M) Bhd & 2 Ors*;

(e) Appeal No 02(F)-08–01 of 2020(B) between *Malaysian Motor Insurance Pool v Aqmal Dakhiruddin*;

(f) Appeal No 02(F)-41–08 of 2020(W) between *Pacific & Orient Insurance Co Bhd v Yeap Tick In*;

(g) Appeal No 02(F)-30–07 of 2020(K) between *Pacific & Orient Insurance Co Bhd v Arnandan a/l Soria Demadw*; and

(h) Appeal No 02(F)-28–04 of 2021(W) between *Pacific & Orient Insurance Co Bhd v Navin Naicker & Anor.*

[2] Of the eight appeals, five involve Pacific & Orient Insurance Co Bhd, four as appellants and one as respondent and all five represented by the same counsel. The other three appeals involve Amgeneral Insurance Bhd, Allianz General Insurance Company (M) Bhd and Malaysian Motor Insurance Pool, each represented by different sets of counsel. Some of the appeals involve common issues of law but we shall deal with them separately as the facts and arguments are not exactly the same.

APPEAL NO 1: AMGENERAL INSURANCE BHD V SA' AMRAN A/L ATAN & 2 ORS

[3] We shall begin with Appeal No 1. The second and third respondents were not represented in this appeal and did not file any written submissions. There is only one leave question posed for our determination and the question is as follows:

> Whether the registration imposes liability on the insurer notwithstanding the insured ceased to have insurable interest in the motor vehicle, at the time of the accident?

[4] Implicit in the question is the proposition that the insurer's liability under the third party risks insurance policy lapses if the motor vehicle is sold to a third party by the insured without the insurer's knowledge notwithstanding the fact that the insured is still the registered owner of the motor vehicle and notwithstanding the fact that the policy in respect of the motor vehicle has not expired at the time of the accident. The following submissions by learned counsel captures the pith and substance of the appellant's argument:

> There is a stark difference between the legal concept of 'transfer of interest' and 'transfer of ownership' in the law of insurance. The meaning of 'transfer of interest'

A or in colloquial terms 'sambung bayar' basically means the insured has sold the motor vehicle to a third party without the knowledge of the insurer the consequence of which is that the insured ceased to have any insurable interest, possession, care, custody and control of the motor vehicle. The issue of transfer of ownership on the other hand means removing the name of the previous owner from the register and B substituting it with the name of the new owner.

[5] The contention was that the second respondent's (the insured) act of selling the motor vehicle ('the car') to a third party rendered the third party risks insurance policy issued in her name null and void and unenforceable against C the appellant. It was submitted that by selling the car to the third party without the appellant's knowledge, the second respondent had divested herself of her 'insurable interest' in the car, thereby absolving the appellant of all liability to indemnify her for any claim of loss and damage suffered by the first respondent (the accident victim and third party claimant) arising from the road accident D involving the car, effectively meaning that the first respondent had no cause of action against the appellant as the insurer of the car.

[6] It is an argument that leans heavily in favour of protecting the insurer's E interest and ignoring the plight of the first respondent who suffered loss and damage as a result of the accident through no fault of his. This begs the question what Parliament's intention was in enacting the law on third party risks insurance policy if, in a situation such as the one obtaining in the present appeal, the insurance policy is rendered void, thus depriving the innocent third F party accident victim of the benefit of the statutory third party risks insurance policy, which is meant to protect him against risks arising out of the use of motor vehicles.

[7] Considerable importance was placed by learned counsel for the appellant G on the issue of insurable interest and the doctrine of *uberimae fidei* or the duty of 'utmost good faith'. The term 'insurable interest' is not found in the Road Transport Act 1987 ('the RTA') and learned counsel relied on two textbook authorities as his reference material, the first of which is *Halsbury's Laws of Malaysia* (Volume 4, Malayan Law Journal SB2000) which the High Court in H *Lonpac Insurance Bhd v Mohamad Hakim bin Zulkifli & Ors* [2017] MLJU 1835 referred to, where the learned authors said at p 37:

> With regards to an insurable interest in property, the general principle for Malaysia would be that an insurable interest should exist at the time the event causing the loss occurs. Thus, an owner of a car who has sold it, would not be able to recover from I a motor policy which has not expired if the car is damaged in the hands of new owner.

[8] The second authority is *The Law of Motor Insurance* (2nd Ed, Thomson Reuters 2015) by Robert Merkin and Maggie Hemsworth where the following

passages at pp 62–63 were reproduced by learned counsel in his written submissions:

> Insurable interest rests upon two pillars. The first, which requires insurable interest at the date that a policy is taken out ... is based on the need to stamp out wagering disguised as insurance ...
>
> The same cannot be said of the second pillar, the principle of indemnity under which the assured can recover only what has been lost. If the assured has no insurable interest at the date of loss, then there can be no claim against the insurers. Insurable interest is, however, concerned with the existence of an interest and not its value ...
>
> It is undoubtedly the case that the assured, by selling the insured subject matter of the policy and handing the subject matter to the purchaser deprives himself of any insurable interest in the subject matter... If the seller no longer has any interest in the vehicle, it follows that the seller cannot give any permission to the purchaser to use the vehicle: there is no right possessed by the seller in respect of which permission can be given. Accordingly, any use of the vehicle by the purchaser cannot be covered by the seller's insurance, and the purchaser will be insured if at all under his own policy. This was held to be the case in *Peters v General Accident Fire and Life Assurance Corpn Ltd* [1938] 60 Ll L Rep 311 and *Smith v Ralph* [1963] 2 Lloyd's Rep 439.

[9] As for the doctrine of *uberrimae fidei*, eight authorities were cited in support and they were the following: *Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330; *United Malayan Insurance Co Ltd v Lee Yoon Heng* [1964] 1 MLJ 453; *Peters v General Accident & Life Assurance Corpn Ltd* [1937] 4 All ER 628; *Etiqa General Takaful Bhd v Habibah bt Hashim & 3 Ors (Kuala Lumpur High Court) Originating Summons No WA-24NCC-388–08 of 2018* (unreported) dated 25 January 2019; *Pacific & Orient Insurance Co Bhd v Hameed Jagubar bin Syed Ahmad* [2018] 12 MLJ 1; [2018] 6 MLRA 85 (FC); *Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] 1 MLJ 5; *Carter v Boehm* [1766] 97 ER 1162; and *Tan Jing Jeong v Allianz Life Insurance Malaysia Bhd & Anor* [2012] 7 MLJ 179.

[10] We were also referred to s 96(5) of the Road Transport Act 1987 ('the RTA') which is a codification of the requirement to make full and frank disclosure on the part of the insured. The section reads:

> (5) In this section, the expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risks, and if so at what premium and on what conditions, and the expression 'liability covered by the terms of the policy' means a liability but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

[11] We must say at the outset and with due respect to learned counsel that his reliance on the authorities and on s 96(5) of the RTA is misconceived as the

doctrine of *uberrimae fidei* has no application to the factual matrix of the present case. This is not a case where the insured (second respondent) failed to make full and frank disclosure at the time of entering into the policy agreement with the appellant. Nor is this a case where, during the subsistence of the policy agreement, the insured (second respondent) committed fraud or dishonesty in submitting a claim for indemnity under the insurance policy.

[12] In any case, the doctrine of *uberrimae fidei* is a common law doctrine that is only applicable between the insured and the insurer and does not affect the rights of third parties under the provisions of ss 94 and 95 of the RTA, which protect third parties against risks arising out of the use of motor vehicles.

[13] The present appeal is simply a case of a claim by an innocent third party accident victim (first respondent) against the driver (third respondent) and the insured (second respondent) for the loss and damage that he suffered as a result of the road accident involving the car. We have not been shown which clause of the third party risks insurance policy was the second respondent in breach of that rendered the policy null and void. The policy does not even contain a clause that requires the second respondent to notify the appellant of the sale of the car, not that the existence of such clause will absolve the appellant of liability in the event of an accident involving the car.

[14] The background facts are these. On 6 September 2014, the first respondent Sa' Amran a/l Atan was involved in a road accident with the car, which has registration No JFS 3133 driven by the third respondent Nakiuddin bin Ahmad. Pursuant to a search made by the first respondent at the Road Transport Department, the registered owner of the car was found to be the second respondent Fazlina bt Mihad and the appellant as the insurer. The insurance policy was valid for the period from 8 November 2013 to 7 November 2014, which therefore covered the date of the accident on 6 September 2014.

[15] Having obtained the information, the first respondent filed an accident suit in the Sessions Court at Kuantan seeking for damages in respect of the accident by naming the second and third respondents as defendants. In the suit, the Kuantan Sessions Court found both the second and third respondents 100% liable for the accident.

[16] While the Kuantan Sessions Court suit was ongoing, the appellant filed an originating summons in the High Court at Kuala Lumpur seeking for a declaration that the insurance policy was null and void pursuant to s 96(3) of the RTA, which provides as follows:

(3) No sum shall be payable by an insurer under subsection (1) if before the date the

liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[17] The basis for the application was the following affirmation by the second respondent (the insured) in her statutory declaration which she provided to her insurer (the appellant):

(a) in November 2007, she sold the car to a man by the name of 'Zul' who was a salesman at Tetuan Dijadi Auto. She did so as part of a trade-in transaction to obtain a Honda Civic car;

(b) she surrendered the car to Zul and gave him RM7,000 to settle the balance of the car loan for the car with CIMB Bank and signed a transfer form; and

(c) until now the ownership of the car has not been transferred to the new owner.

[18] It can thus be seen that the only reason why the appellant repudiated the insurance policy was because the second respondent was no longer the owner of the car after selling it to Zul in November 2007. On 31 July 2017, the Kuala Lumpur High Court allowed the appellant's application for the following reasons:

(a) the application by the appellant to nullify the insurance policy was made before the date the liabilities of the second and third respondents were incurred, ie before judgment was delivered in the accident suit at the Kuantan Sessions Court;

(b) the appellant's application was not time barred; and

(c) there was a transfer of interest in the vehicle although there was no formal transfer of ownership of the car to the new owner in accordance with the procedure laid down in s 13 of the RTA.

[19] The ratio of the decision is that the insurer ceased to be bound by the insurance policy once the insured ceased to have insurable interest in the motor vehicle after selling it to a third party.

[20] Dissatisfied with the decision, the first respondent appealed to the Court of Appeal and succeeded. His appeal was allowed on 20 February 2018 on the following grounds:

(a) there was insufficient evidence to show that property in the car had passed to the driver premised solely on the registered owner's (second respondent) statutory declaration;

(b) the adjusters' report conflicted with the genuine documentary evidence, ie the JPJ registration card and the insurance policy;

(c) the transfer was not done pursuant to s 13 of the RTA;

(d) the registered owner (second respondent) is deemed to be the owner and remains liable for any proceedings by virtue of s 109(1) of the RTA; and

(e) the conditions in a policy of insurance are deemed to be of no effect in relation to the liability of the insurer to third parties pursuant to ss 94 and 95 of the RTA.

[21] It was a rejection by the Court of Appeal of the appellant's argument that it was not liable to the first respondent on the ground that the insured (second respondent) had no insurable interest in the car after selling it to Zul in November 2007.

[22] Before us, learned counsel for the appellant advanced the following arguments in persuading us to answer the leave question in the negative, ie that the registration does not impose liability on the insurer if the insured ceased to have insurable interest in the car at the time of the accident:

(a) the Court of Appeal was wrong in allowing itself to be influenced by its own decisions in *Zainudin Mat Isa & Anor v The Pacific Insurance Berhad & Ors* [2017] 1 LNS 1979 and in *Muhamad Haqimie Hasim & Anor v Pacific & Orient Insurance Co Berhad* [2018] MLJU 629; [2018] 1 LNS 627. It was argued that the Court of Appeal should not have followed *Zainudin Mat Isa* as the Court of Appeal in that case misdirected itself in dealing with the issue of transfer of interest and the issue of transfer of ownership. It was contended that the issue at the forefront of the present appeal is whether there was a transfer of interest, pointing out that the statutory declaration affirmed by the registered owner (second respondent) was unequivocal and the Court of Appeal had no reason to doubt the veracity and authenticity of the statutory declaration;

(b) the Court of Appeal misdirected itself in holding the view that the register of title is paramount evidence of ownership;

(c) the Court of Appeal's reliance on *Muhamad Haqimie* was misconceived as the facts are distinguishable from the facts of the present appeal. It was

argued that in the present appeal, the second respondent as the insured had not allowed and could not possibly have allowed the third respondent (*de facto* owner) to buy any policy under her name and to drive the car with her permission, consent, knowledge and approval. It was contended that the Court of Appeal in *Muhamad Haqimie* made the wrong deduction that since the previous owner remained as the registered owner, the insurer became liable by virtue of s 109 of the RTA;

(d) s 109 of the RTA only deals with some form of offence under the Act and as such the meaning ascribed to the word 'proceedings' in the section must be read subject to the word 'prosecution' as the Act has a penal and quasi-penal consequences for summons cases. As such, applying the *ejusdem generis* principle, the word 'proceedings' must be read together with prosecution or species of prosecution, *viz* for summons cases. In other words, the word 'proceedings' in s 109 refers only to criminal or quasi-criminal proceedings and not to proceedings such as a claim for damages arising from a road traffic accident. Reliance was placed on the High Court cases of *Zulkiflee bin Mohamad v Mahmudin bin Arshad* [1998] MLJU 180 and *The Pacific Insurance Bhd (dahulunya dikenali sebagai MCIS Zurich Insurance Bhd) lwn Ishak bin Md Hanafiah dan lain-lain* [2017] MLJU 434;

(e) the statutory declaration of the insured (second respondent) is the best evidence, and the insured and the buyer (*de facto* owner) had not come to challenge the originating summons and the admission in the statutory declaration, citing *Habibah bt Hashim*;

(f) the registration is not an issue document of title. The mere fact that there is no transfer recorded on the registration does not mean that the vehicle cannot be sold or transferred. Once the vehicle is sold, and the registered owner ceases to have possession of the vehicle, the policy automatically lapses unless there is novation as the insurance policy is concerned with transfer of interest in the motor vehicle and not with *de facto* transfer appearing on the record of registration;

(g) s 13 of the RTA imposes a duty on the registered owner and the new owner to effect registration. It also imposes a duty on the registered owner and the new owner not to use the vehicle until all the relevant processes are completed (s 13(1)(c)). The act of not registering the transfer will be a breach of the Hire Purchase Act 1967 (s 38). In the present case, there had been a clear and blatant breach of the law with penal consequences;

(h) s 13 of the RTA merely promulgates the procedure on how a transfer is effected and nowhere in the Act is it mentioned that it is the duty of the insurer to effect transfer. In fact, the insurer has no knowledge of the dealings until it is informed by the registered owner who intends to sell or has sold the motor vehicle;

(i) it cannot be the intention of Parliament to hold innocent parties liable for an act of a third party that is not within their knowledge. It was submitted that the appellant is an innocent party;

(j) the Road Transport Department registration is not a conclusive issue document of title and as such the court should look and deliberate on the statutory declaration deposed to by the insured: *Mohamed Mydin v Ramiah* [1965] 1 MLJ 33; *MBf Finance Bhd v Low Ping Ming t/a Low Peng Enterprise* [2005] 3 MLJ 208; *Muraly a/l Varataa Raju v Allianz General Insurance Company (M) Bhd* [2019] MLJU 1883; [2019] MLRHU 1270. The court cannot overlook and underestimate the importance of the statutory declaration as it attracts criminal penalty if it is made fraudulently;

(k) in Malaysia, a vehicle can be sold without the need to have it registered as the sale and purchase is governed by the Sale of Goods Act 1957 — that a sale of a motor vehicle is completed once possession is transferred to the new owner and there is no requirement that the sale is only completed once the name of the new owner is imprinted on the registration card, as the registration card is not an instrument of title: *Mohamed Mydin*, a Federal Court decision which was applied in *MBf Finance Bhd v Low Ping Ming t/a Low Peng Enterprise*;

(l) just because one is a registered owner, it does not make him liable and that in any event the appellant had rebutted the presumption of ownership based on the statutory declarations of both parties. Reference was made to *Muraly a/l Varataa Raju v Allianz General Insurance Company (M) Bhd* [2019] MLJU 1883; [2019] MLRHU 1270;

(m) the Court of Appeal in *Aqmal bin Dakhirrudin v Azhar bin Ahmad & Anor* [2019] MLJU 1554; [2019] 5 MLRA 510 was wrong in adopting the *Zainudin Mat Isa* and *Muhamad Haqimie* approach;

(n) the Court of Appeal's reliance on this court's decision in *Nanyang Insurance Co Ltd v Salbiah & Anor* [1967] 1 MLJ 94 was misconceived as the facts are distinguishable in that the insured in that case only intended to lend the car until the full amount was paid up, meaning the insured still retained care, custody, control and possession of the vehicle, unlike the present case where the insured had surrendered the care, custody, control and possession of the car in question to a third party;

(o) the Court of Appeal was wrong in *Zainudin Mat Isa, Muhammad Haqimie* and *Aqmal* in not discussing this court's decision in *Roslan bin Abdullah v New Zealand Insurance Company Ltd* [1981]2 MLJ 324; [1981] 1 LNS 40; [1981] 1 MLRA 445. In that case the truck was sold and the insurance policy lapsed unless there was novation of the policy, of which there was none. Accordingly, it was held that the driver of the truck was not covered by the insurance policy.

(Note: The case of *Roslan bin Abdullah* is irrelevant as there was no insurance policy in force at the material time as it had lapsed, unlike the present appeal where the policy was valid and subsisting at the time of the accident);

(p) the law of insurance is concerned with transfer of interest as opposed to the fact of actual registration. Once the property that is insured has been transferred or where the insured has given up possession of the motor vehicle, then he is deemed to have no interest in the said vehicle the consequence of which is that the policy will lapse automatically: *Peters v General Accident & Life Assurance Corpn Ltd* [1937] 4 All ER 628; *Watkins v O'Shaughnessy* [1939] 1 All ER 385; *Bibendum Sdn Bhd lwn Amanah Scott Properties (KL) Sdn Bhd* [2011] MLJU 1578; [2011] 1 LNS 204; [2011] AMCR 792:

> With regards to an insurable interest in property, the general principle for Malaysia would be that an insurable interest should exist at the time of the event causing loss occurs. Thus, an owner of a car who has sold it, would not be able to recover from the policy which has not expired if the car is damaged in the hands of the new owner.
>
> (Note: *Bibendum* is irrelevant as it involved a claim by the registered owner of the car himself, unlike the claimant (first respondent) in the present appeal who is a third party accident victim and not the registered owner and insured of the motorcar); and

(q) since the second respondent had sold the car before the date of the accident, there was no insurable interest at the time of the accident, and the issued policy was void and unenforceable.

[23] The last ground above sums up neatly the appellant's argument that it should not be held liable for the loss and damage suffered by the first respondent even though the second respondent (the insured) was the registered owner of the car at the time of the accident on 6 September 2014 and even though the third party risks insurance policy issued in her name had not expired at the time of the accident, which the appellant of course contended otherwise on the ground of lack of insurable interest.

[24] The first respondent's reply to the appellant's submissions was that the Court of Appeal was correct in finding that the appellant failed to prove lawful transfer of ownership of the car and she therefore remains the registered owner. Reliance was placed on the following authorities:

(a) *Pengarah Jabatan Pengangkutan Negeri Selangor & Ors v Sin Yoong Ming* [2015] 1 MLJ 1 where this court in dealing with s 13 of the RTA observed as follows:

Under s 13(1) of the Act the existing registered owner, on any change of possession of a motor, is required to forward to the director a statement in the prescribed form within seven days after such change of possession. The new owner is also required to forward to the director a statement in the prescribed form together with the registration certification and the prescribed fee within seven days. After they complied with the requirements the new owner is entitled to be registered as the new owner of the motor vehicle.

(b) the Court of Appeal case of *Zainudin Mat Isa,* which decided that the name that appears in the registration is evidence to show ownership. This is what the court said in that case:

[17] The critical evidence pertaining to title and ownership which is the JPJ registration card and the insurance policy are directly at odds or contrary to the two SDs provided in support of the first respondent's case. Weighing up the evidence, it is not possible to conclude, on a balance of probabilities, that the ownership of the vehicle had passed from R3 to R2's brother and then R2. There is simply insufficient evidence to support that conclusion. If at all, weight ought to be accorded to the official documents which support the appellant's case.

(c) *Muhamad Haqimie*, where the Court of Appeal through the judgment of Tengku Maimun Tuan Mat JCA (as the Right Honourable the Chief Justice then was) explained the effect of a transfer of interest in the vehicle:

[11] We have given anxious consideration to the competing claims of the parties. Having done so we are of the unanimous view that the appeal ought to be allowed for the following reasons:

(d) the central issue for consideration here is whether the alleged transfer of interest from Normala to Lalmiya had the effect of rendering the policy ineffective or causing it to lapse; and

(e) s 13 of the RTA sets out the procedure to be adopted upon change of possession upon transfer pursuant to a sale. It requires that the new possessor or new owner register himself within seven days of such change of possession. This was not done in the present case.

(a) the Indian Supreme Court case of *Pushpa @ Leela & Ors v Shakuntala & Ors* [2011] 2 SC 240, which held as follows:

11. It is undeniable that notwithstanding the sale of the vehicle neither the transferor Jitender Gupta nor the transferee Salig Ram took any step for the change of the name of the owner in the certificate of registration of the vehicle. In view of this omission Jitender Gupta must be deemed to continue as the owner of the vehicle for the purposes of the Act, even though under the civil law he ceased to be its owner after its sale on February 2, 1993.

(b) s 109(1) of the RTA deems the appellant to be the owner of the car. The subsection reads:

> (1) For the purpose of any prosecution or proceedings under this Act, the registered owner of a motor vehicle shall be deemed to be the owner of that motor vehicle.

(c) since the insured (second respondent) in her statutory declaration admitted that the car was still under hire purchase with CIMB Bank, any right, title and interest under the hire purchase agreement could only be done with the consent of CIMB Bank. Section 12(1) of the Hire Purchase Act 1967 is relevant and provides as follows:

> (1) The right, title and interest of a hirer under a hire purchase agreement may be assigned with the consent of the owner, or if his consent is unreasonably withheld, without his consent.

(d) the Court of Appeal in *Affin-ACF Finance Bhd (formerly known as Asia Commercial Finance (M) Bhd) v Phang Ngan Heong (t/a Syarikat Kereta Kwong Yue* [2010] 7 MLJ 561; [2010] 7 CLJ 592 had decided as follows in dealing with the issue of hire purchase:

> As such, the key issue to be determined by the court is whether the defendant could have and did pass a good and valid title to the plaintiff following the sale of the vehicle. The defendant has argued that it did pass a good title at that time as the vehicle was successfully registered in the name of the hirer by the Road Transport Department. With regret, the court does not find that the registration of the vehicle in the name of the hirer amounts to a passing on a good and valid title. To discharge that responsibility, the plaintiff should have continued to have a good and valid title so that at the end of the hire purchase period, when the hirer has completed paying all the installments under the hire purchase agreement, the plaintiff would be able, in turn, to pass a good and valid title to the hirer. The seizure of the vehicle by the Police and its subsequent return to the rightful owner meant that the plaintiff no longer had physical possession of the vehicle and would be in no position to pass on any title to the hirer.

(e) the principle governing a vehicle under hire purchase had also been set out by this court in *Ong Siew Hwa v UMW Toyota Motor Sdn Bhd* [2018] 5 MLJ 281, as follows:

> Under this hire purchase agreement, the plaintiff is 'the hirer' of the car and the second defendant is 'the owner'. Under the law what was obtained by the plaintiff under P5 was possession, not ownership of the car which remained with the second defendant ...
>
> Applying *Ahmad Ismail* to the facts of this case, whatever contractual relationship between the plaintiff and the first defendant was superseded by the hire purchase agreement (exh PS). The first defendant completely faded out of the picture, and the only contract that remained was the hire purchase agreement (exh PS) entered into between the plaintiff and the second defendant.

[25] Having considered the rival arguments and the authorities carefully, we are inclined to agree with the first respondent that the Court of Appeal was right in finding that the appellant failed to prove transfer of ownership of the car. First of all, transfer of interest is not transfer of ownership. A valid transfer of ownership can only be effected by following strictly the procedure laid down by s 13(1) of the RTA and not merely by selling the car to a third party. Section 13(1) stipulates as follows:

> 13(1) On any change of possession of a motor vehicle upon a voluntary transfer made by the registered owner —
>
> (a) the registered owner shall within seven days after such change of possession, forward to the Director of a registration area a statement in the prescribed form, and shall deliver to the new possessor or the new owner the registration certificate relating to the motor vehicle and, unless he is surrendering the licence under section 19, the licence;
>
> (b) the new possessor or new owner shall, within seven days after such change of possession, forward to such Director a statement in the prescribed form together with the registration certificate and the prescribed fee; and
>
> (c) the motor vehicle shall not be used for more than seven days after such change of possession unless the new possessor or the new owner is registered as the owner thereof and, if the licence has been surrendered by the registered owner, it shall not be used until the new owner or new possessor has taken out a new licence:
>
> Provided that this subsection shall not apply in any case where the change of possession is consequent on a contract of hiring and the period of hiring does not exceed one month.

[26] The procedure is mandatory and is meant to ensure that there is a proper transfer of the motor vehicle from the registered owner to the purchaser. This in turn will ensure that if the new owner is involved in an accident with other road users, the victim will be able to identify who the registered owner of the motor vehicle is for the purpose of maintaining an action against the tortfeasor.

[27] In *Naveen Kumar v Vijay Kumar & Ors* (Civil Appeal No 1427 of 2018) (unreported), the Supreme Court of India held that a claimant for compensation ought not to be burdened with following a trail of successive transfers which are not registered with the registering authority as to hold otherwise would be to defeat the statutory object and purpose of the relevant Indian Road Transport Act. Section 2 of the RTA defines 'owner' as follows:

> (a) in relation to a motor vehicle registered or deemed to be registered under this Act, means the registered owner of such vehicle; and

(b) in relation to any other motor vehicle, means the person in possession of or using or having the use of the motor vehicle.

[28] In the present case, it is undisputed that there was non-compliance with the requirements of s 13(1) when the car was sold by the second respondent to Zul in November 2007. The second respondent therefore remained the registered owner of the car at the time of the accident and even to this day.

[29] Being the registered owner of the car at the time of the accident, the second respondent was deemed by s 109(2) of the RTA to be liable for the act or omission of the third respondent (driver of the car) in causing the accident. She could only absolve herself of liability if she could satisfy the court that she had taken all reasonable steps and precautions to prevent such act or omission by the driver. There is no such evidence before the court. Therefore, the third party risks insurance policy, which was issued to indemnify her in the event of an accident involving the car, was in full force at the time of the accident.

[30] It cannot be the intention behind the proviso to s 109(2) that the exemption from liability of the registered owner extends to tortious acts of the driver, such as negligent driving causing loss and damage to other road users. The fact that the proviso only refers to ss 41 to 49, which are penal in nature, dispels any notion that the exemption from liability extends to the civil liability of the registered owner.

[31] Clearly the proviso is only intended to shield the registered owner from prosecution for the driver's contravention of ss 41 to 49, and not for the driver's tortious acts such as negligent driving. The registered owner is still liable for the negligent act or omission of the driver. Section 109(2) of the RTA is reproduced in full below:

> Liability of registered owner and others
>
> (1) For the purpose of any prosecution or proceedings under this Act, the registered owner of a motor vehicle shall be deemed to be the owner of that motor vehicle.
>
> (2) Except where otherwise required by this Act, any act or omission by whoever was the driver of a motor vehicle at the material time, shall for the purpose of any prosecution or proceedings under this Act, be deemed to be the act or omission of the registered owner unless he satisfies the court that he took all reasonable steps and precautions to prevent such act or omission.
>
> Provided that this subsection shall not apply to an act or omission of a person in driving a motor vehicle in contravention of sections 41 to 49.
>
> (3) In the event of any act or omission by whoever was the driver of a motor vehicle at the material time, which would have been an offence against this Act if committed by the registered owner, such driver will also be guilty of that offence.

[32] As can be seen, two things are deemed by s 109, namely: (1) the registered owner is the owner of the motor vehicle; (2) subject to the qualification mentioned in sub-s (2), the act or omission of the driver of the motor vehicle is the act or omission of the registered owner of the motor vehicle for the purpose of any prosecution or proceedings under the Act.

[33] It is interesting to note in passing that when the RTA repealed the Road Traffic Ordinance 1958 ('the RTO'), it retained the deeming provisions of s 138(1) of the RTO through s 109(1). There are however material differences in the wordings of subsections; and (2) of the two provisions. While s 109(2) of the RTA speaks of 'the driver of a motor vehicle', s 138(2) of the RTO speaks of 'the servant, agent or partner of the registered owner'.

[34] Thus, while under s 109(2) of the RTA it is the act or omission of the driver that is deemed to be the act or omission of the registered owner for the purpose of prosecution or proceedings under the Act, under s 138(2) of the repealed RTO, it is the act or omission of the servant, agent or partner of the registered owner that is deemed to be the act or omission of the registered owner. This is reflective of Parliament's intention through s 109(2) of the RTA to widen the scope of the deeming provision by not confining it to the servant, agent or partner of the registered owner for the purpose of prosecution or proceedings under the Act.

[35] Therefore, the law as it presently stands is that the act or omission of the man behind the wheels or behind the handle bars as the case may be is to be taken as the act or omission of the registered owner for the purpose of prosecution or proceedings under the Act. It needs to be mentioned that the repealed RTO provides for sub-s (4) whereas s 109 of the RTA ends with sub-s (3). We reproduce below s 138 of the RTO for purposes of comparison:

> 138(1) For the purpose of any prosecution or proceedings under this Ordinance the registered owner of a motor vehicle shall be deemed to be the owner of that motor vehicle.
>
> (2) Except where otherwise required by this Ordinance any act or omission by the servant, agent or partner of the registered owner shall for the purpose of any prosecution or proceeding under this Ordinance be deemed to be the act or omission of the registered owner unless he shall satisfy the court that he took all reasonable steps and precautions to prevent such act or omission:
>
> Provided that this sub-section shall not apply to an act or omission of a person in driving a motor vehicle in contravention of sections 35 to 42 inclusive of this Ordinance.
>
> (3) In the event of any act or omission by a servant, agent or partner of the registered owner which would have been an offence under this Ordinance if committed by the registered owner, that servant, agent or partner shall also be guilty of that offence.

(4) Where the registered owner is a body corporate, any person who at the time of the commission of such offence was a director, general manager, secretary or other similar officer of the body corporate, or who was purporting to act in any such capacity, shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance, and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

[36] The effect of a deeming provision has been explained by the learned authors of *NS Bindra's Interpretation of Statutes* (12th Ed) in the following terms:

Deeming provision

The word 'deemed' is used a great deal in modern legislation. Sometimes, it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes, it is used to put beyond doubt particular construction that might otherwise be uncertain or to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible. However, the mere use of the word 'deemed' is not in itself sufficient to set up a legal fiction. Legal fiction is treating something not done as done and this requires legislative authority. Courts cannot set up legal fictions without such authority.

Where the legislature says that 'something should be deemed to have been done' which in truth has not been done, it creates a legal fiction and in that case, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

In the words of Lord Asquith:

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs, *it does not say that having done so; you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.* (Emphasis added.)

[37] In *The Construction of Statutes* (3rd Ed) the learned authors hold the following views at p 131:

There is only one rule in modern interpretation, namely courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretation, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the

court must then adopt an interpretation that is appropriate. An appropriate interpretation Is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its compliance with the legislative text; and (c) its acceptability, that is, the outcome is reasonable and just.

[38] We accept the first respondent's argument that read as a whole and in the right context, the language of ss 109(1), (2) and (3) leaves no room for doubt that it applies to civil and criminal proceedings alike and not only to criminal or quasi criminal prosecutions under the Act as contended by learned counsel for the appellant. In *Black's Law Dictionary* (9th Ed) the word 'proceeding' is defined in items 1 and 2 as follows:

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency.

[39] The word 'prosecution' on the other hand is given the following meaning:

> 2. A criminal proceeding in which an accused is tried.

[40] A claim for damages by a third party claimant arising from a road accident involving a motor vehicle covered by a third party risks insurance policy issued pursuant to s 90 of the RTA is a 'lawsuit' and not a prosecution under the Act. It is therefore a 'proceedings' within the meaning of s 109(2) of the RTA.

[41] There was no necessity for Parliament to use the word 'proceedings' in s 109(2) if the intention was to restrict its application to criminal prosecutions under the Act and to exclude all forms of civil proceedings. Clearly, proceedings under s 96(3) is civil in nature, and so are proceedings contemplated by ss 96(1), 19(2), 22(7), 68(1), 77(8), 82(7), 84(5), 85(4) and 87. All these are 'proceedings' under the Act. There is therefore no basis to interpret the word 'proceedings' in s 109(2) to be synonymous with the word 'prosecution' in same section based on the *ejusdem generis* rule as contended by learned counsel for the appellant.

[42] Learned counsel's submission on s 109 in so far as it relates to the appellant's liability under the insurance policy was two-fold, namely:

(1) the appellant had rebutted the deeming provision of sub-s 109(1) through the statutory declaration affirmed by the insured (second respondent); and

(2) the provision only applies to criminal or quasi criminal proceedings and not to civil proceedings.

[43] We have just dealt with ground (2) and we shall not repeat it. With regard to ground (1), we are unable to accede to learned counsel's argument that the presumption under sub-s 109(1) of the RTA had been rebutted by the appellant through the second respondent's statutory declaration. Firstly, the presumption can only be rebutted by proof that the second respondent was not the registered owner of the car at the time of the accident. There is no such proof. Secondly, the second respondent's statutory declaration merely proved that she had sold the car to a third party. It is not proof that legal ownership of the car had passed to the third party. As we said, a lawful transfer of ownership can only be established by proof of registration under s 13(1).

[44] As for the issue of insurable interest which forms the basis of learned counsel's argument that the insurance policy had been nullified by the sale of the car to the third party, we need only reiterate what we have just said a short while ago that liability for the negligent act of the third respondent (the driver) is imputed to the registered owner of the car by s 109(2) of the RTA.

[45] In any case, the fact that the second respondent's interest in the car had passed to a third party does not change anything as far as the appellant's liability under the statutory third party risks insurance policy is concerned as the whole purpose of the policy is to indemnify the second respondent (the insured) as 'owner' in the event of a road accident involving the car and third parties.

[46] The court in dealing with a claim for damages by a third party accident victim must not close its eyes to the fact that the insurer has received payment for issuing the third party risks insurance policy to the insured. Having received such payment, the insurer cannot look the other way and resile from its promise to indemnify the insured when indemnity became due by raising the technical ground that the insured had no insurable interest in the motor vehicle at the time of the accident, unless the insurance policy had expired or had been lawfully terminated.

[47] The doctrine of 'mutual benefit and burden' demands that a person cannot take the benefit of a deed without subscribing to the obligations under it: See *Halsall and others v Brizell and another* [1957] Ch 169. The truth is, the real beneficiary of the statutory third party risks insurance policy is the third party accident victim and not the insured. The insured of course benefits by being indemnified by the insurer for any judgment sum obtained against him by the third party accident victim.

[48] There is authority to say that the insured is not required to have insurable interest in the motor vehicle before he is covered by a third party risks insurance policy, and this renders the whole substratum of the appellant's argument unsustainable in law: See *Boss and Another v Kingston* [1963] 1 All

ER 177 where Lord Parker CJ expressed his views as follows:

> The conclusion of the justices was based on the fact that, once the Triumph motorcycle was sold, the appellant Boss had no insurable interest in it. That being so, they were of opinion, following the reasoning in *Rogerson v Scottish Automobile and General Insurance Co, Ltd* (1) and *Tattersall v Drysdale* that the whole policy lapsed, including the further cover provided in respect of other cycles not owned by or under hire to the assured. *It is to observed, however, that, In the present case, unlike the cases referred to, the policy is in respect of third party risk only and, accordingly, that there is no necessity for the assured to have insurable interest in the vehicle.* He could in law at any rate, and possibly in practice, be able to get cover against damage caused by his driving of any vehicle whether or not he had any insurable interest in them. Accordingly, as it seems to me, these cases are not, at any rate directly, relevant and the justices' reasoning was wrong. (Emphasis added.)

[49] Similarly, the insurance policy that we are concerned with in the present appeal is in respect of third party risks only. We find nothing in the RTA that can be construed to mean that a third party risks insurance policy lapses upon sale of the motor vehicle to a third party if otherwise the policy is valid and subsisting, ie has not expired at the time of the sale. It needs to be borne in mind that insurance coverage for third party risks is compulsory under the RTA and failure by any person to comply with the requirement constitutes an offence punishable with fine or with imprisonment or with both, in addition to an order of disqualification from holding or obtaining a driving licence for a specified period. This is made clear by s 90(1) and (2) which read:

> 90 (1) Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.
>
> (2) If a person acts in contravention of this section he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding three months or to both and a person convicted of an offence under this section shall, unless the court for special reasons to be specified in the order thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a driving licence under Part II for a period of twelve months from the date of the conviction.

[50] The provision is in keeping with the second of five objects of the RTA as expressed in the preamble to the Act, which is:

> to make provision for the protection of third parties against risk arising out of the use of motor vehicles;

[51] Where it concerns the liability of insurers, s 91(3) of the RTA which

takes colour from the preamble is relevant and provides as follows:

> (3) Notwithstanding anything in any written law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or class of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or class of persons.

[52] In the context of the present case, the person whom the appellant 'shall be liable to indemnify' under s 91(3) is the second respondent as the insured and registered owner of the car. It is a mandatory requirement of the law which parties to the insurance policy cannot contract out of. This is reflected in s 94 which provides as follows:

> 94 Certain conditions in policies or securities to be of no effect.
>
> Any condition in a policy or security issued or given for the purposes of this Part providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall be of no effect in connection with such claims as are mentioned in paragraph 91(1)(b):
>
> Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.

[53] Section 95 further lists out factors that the insurer cannot use as excuses to avoid liability to pay. The section reads:

> 95 Where a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured by reference to any of the following matters:
>
> (a) the age or physical or mental condition of persons driving the motor vehicle;
>
> (b) the condition of the motor vehicle;
>
> (c) the number of persons that the motor vehicle carries;
>
> (d) the weight or physical characteristics of the goods that the motor vehicle carries;
>
> (e) the times at which or the areas within which the motor vehicle is used;
>
> (f) the horsepower or value of the motor vehicle;
>
> (g) the carriage on the motor vehicle of any particular apparatus;

A

(h) the carriage on the motor vehicle of any particular means of identification other than any means of identification required to be carried under Part II;

(i) the driver of the motor vehicle at the time of the accident being

(j) under the influence of intoxicating liquor or of a drug;

B

(k) the driver of the motor vehicle at the time of the accident not holding a licence to drive or not holding a licence to drive the particular motor vehicle;

(l) the motor vehicle being used for a purpose other than the purpose stated in the policy,

C

shall, as respects such liabilities as are required to be recovered by a policy under paragraph 91(1)(b), to be of no effect.

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person.

D

E

[54] S Santana Dass in his book *The Law of Motor Insurance* reads s 95(k) of the RTA to mean:

Under section 95(k), any condition in the policy that excludes the liability of the insurer, if the vehicle is used for any purposes than for social, domestic, pleasure purposes eg racing, motor sports etc will be ineffective and cannot be used by the insurer to exclude liability insofar as bodily injury or death claims are concerned. This should include use of the motor vehicle for unlawful purposes or acts as well. In any event, the law is that 'criminal acts' of the insured in the use of the motor vehicle are insured under section 91 and the insurers cannot have the liberty to exclude this statutory requirement to insure against unlawful or criminal acts or purposes of their insured to escape their statutory obligation to satisfy the judgments of third parties.

F

G

[55] In *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165; [1997] 2 CLJ 351, the then Supreme Court endorsed the view that the underlying purpose of compulsory motor insurance against third party risks was to ensure that innocent third parties who were injured in vehicular accidents were given full and effective protection, regardless of the private insurance arrangement between the insurer and the insured.

H

I

[56] On s 91(3) of the RTA, this court in *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731 made the following pertinent observations at para 47:

The effect of the above provision is to bypass the requirement of privity of contract. Before the existence of such a provision, such an arrangement vis a vis an authorized

driver would have been unenforceable for want of privity of contract (see: *Vanderpite v Preferred Accident Insurance Corporation of New York* [1933] AC 70, at pp 81–82). However, after the introduction of the above provision, an authorized driver gained the right to claim indemnity notwithstanding that he has paid no consideration towards the policy. See: *Tattersall v Drysdale* [1935] 2 KB 174, at p 182. That is the general rule.

[57] In *Digby v General Accident Fire and Life Assurance Corporation Ltd* [1942] 2 All ER 319 this is what Lord Atkin said:

It will be noticed that there is no reference to policy holder or insured, but merely to 'such person, persons or classes of persons as may be specified in the policy' and by sub-s (4) a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

[58] Lord Wright in the same case went further and elaborated:

It involves three parties, the insurer, the insured and the third party who is making the claim. The insured is not entitled under this section to an indemnity against direct loss or damage suffered by himself, but only against liability to pay compensation to a third party who is claiming against the insured.

[59] In *Rikhi Ram and Anor v SMT Sukhrania & Ors* (Case No Appeal (Civil) 1578 of 1994) (unreported) the Supreme Court of India interpreted ss 94 and 95 of the Indian Motor Vehicles Act 1939 which are similar though not identical to ss 90(1) and 91(3) of the RTA as follows:

Whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of the insurer does not cease so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation of transfer to Insurance Company as required under the provisions of the Act. The reasons being as below:

Insurance against third party is compulsory, and once the insurance company had undertaken liability to third party incurred by the persons specified in the policy, the third party's right to recover any amount is not affected by virtue of the provisions of the Act or by any condition in the policy. Further the liability of an insurer does not come to an end even if the owner of the vehicle does not give any intimation of transfer to the insurance company.

A perusal of sections 94 and 95 would further show that the said provisions do not make compulsory insurance to the vehicle or to the owners. Thus, it is manifest that compulsory insurance is for the benefit of third parties. The scheme of the Act shows that an insurance policy can cover three kinds of risks, ie owner of the vehicle; property (vehicle) and third party. The liability of the owner to have compulsory insurance is only in regard to the third party and not to the property. Section 95(5) of the Act shows that it was intended to cover two legal objectives. Firstly, that no

A one who was not a party to a contract would bring an action on a contract, and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

B

On analysis of ss 94 and 95, it is found that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and the other third party is for whose benefit the vehicle is insured. So far as the transferee who is the third party in the contract he cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. *However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.* (Emphasis added.)

C

[60] In *United India Insurance Co Ltd v Santro Devi and Others* [2009] 3 MLJ 130 (SC) the Supreme Court of India was again called upon to consider whether insurers were liable to indemnify the insured when the vehicle was sold but the insured remained as the registered owner when there was a claim for personal injury by a third party. This was how the Indian apex court dealt with the issue:

D

E The provisions of compulsory insurance have been framed to advance a social object. It is in a way part of the social justice doctrine. When a certificate of insurance is issued, in law, the insurance company is bound to reimburse the owner. There cannot be any doubt whatsoever that a contract of insurance must fulfill the statutory requirements of formation of a valid contract *but in case of a third party risk, the question has to be considered from a different angle*. (Emphasis added.)

F

[61] The position in Australia can be discerned from the following views held by the learned authors of *Kenneth Sutton in Insurance Law in Australia* (2nd Ed) at p 371 para 6.24 under the heading 'Presumption of insurable interest':

G

In *Stock v Inglis* [1884] 12 QBD 564 at 571 Brett MR sought to mitigate the arbitrariness and harshness of the common law by stating that it was the duty of a court always to lean in favour of an insurable interest, if possible, for after the insurer had received the premium the objection that there was no insurable interest was often a technical objection without any real merit as between insurer and assured. This dictum has been referred to in a number of subsequent decisions but it is submitted that there will be fewer occasions on which to invoke it in the future in the light of the expanded definition of insurable interest contained in s 17 of the Insurance Contracts Act 1984.

H

I

[62] In *Siu Yin Kwan (administratrix of the Estate of Chan Ying Lung deceased) & Anor v Eastern Insurance Company Limited* [1993] 1 LNS 65, a case that emanated from Hong Kong, the Privy Council had occasion to consider whether insurable interest is a requirement for a valid indemnity policy. The

Privy Council held that for indemnity insurance, there is no requirement for insurable interest. To better appreciate the context of the decision, we are taking the liberty to quote *in extenso* the following passages in the judgment of Lord Llyod:

> They now turn to consider the second main defence, based on s 2 of the Life Assurance Act 1774. It can be dealt with shortly. Mr Thomas submits, and the majority of the Court of Appeal have held, that the policy is payable on the happening of an event, within the meaning of s 2 of the Act, that event being the insured's liability to pay compensation in respect of injury to his employees. Since the name of the person interested, that is to say Axelson, was not inserted in the policy, the insurance is unlawful and void.
>
> The meaning of s 2 of the Act was considered by the Court of Appeal in Mark *Rowlands v Berni Inns Limited* [1986] 1 QB 211, a case of fire insurance. The plaintiff was a freeholder of the premises. The defendant was a tenant of the basement. The question was whether the policy taken out by the plaintiff endured for the benefit of the defendant, although his name did not appear in the policy. It was held that the policy did not infringe s 2 of the 1774 Act since the Act was not intended to apply to indemnity insurance.
>
> On the other hand, in *Re King*, *Robinson v Gray* [1963] Ch 459 Lord Denning said at p 485.
>
> You must remember that when you take out a policy of fire insurance of a building (as distinct from goods), you must insert in the policy the names of all the persons interested therein, or for whose benefit it is made. No person can recover thereon unless he is named therein, and then only to the extent of his interest. That is clear from the Life Assurance Act, 1774, ss 2, 3 and 4, which by its very terms applies to any other event as well as life. If the tenant insures, therefore in his own name alone, it is only good to the extent of his interest.
>
> Faced with this conflict of authority their Lordships prefer the decision of the Court of Appeal in the former case. In *Re King* the point was not argued. The observation of Lord Denning was obiter and is not reflected in the judgments of the other two members of the Court. Some doubt as to the correctness of *Mark Rowlands Limited v Berni Inns Limited* is expressed in *MacGillivray and Parkington* (supra) at para 154. But their Lordships do not share these doubts.
>
> There are two reasons why their Lordships prefer the decision in *Mark Rowlands Limited v Berni Inns Limited*. In the first place the words 'event or events' in s 2, while apt to describe the loss of the vessel, are hardly apt to describe Axelson's liability arising under the Employees Compensation Ordinance, or at common law, as a consequence of the loss of the vessel. Secondly, s 2 must take colour from the short title and preamble to s 1. By no stretch of the imagination could indemnity insurance be described as a 'mischievous kind of gaming'. Their Lordships are entitled to give s 2 a meaning which corresponds with the obvious legislative intent.

[63] Another case beyond our jurisdiction which may shed some light on the issue is the case of *Austin v Zurich General Accident and Liability Insurance Co*

Ltd [1945] 1 All ER 316 ('Zurich'). In that case, the appellant who was the driver of the car of the insured party with the latter's permission sued the insurance company (respondent) for indemnity under the insurance policy. The English Court of Appeal comprising Lord Greene MR, McKinnon LJ and Uthwatt J held that the appellant's rights against the respondent company under the insurance policy arose out of s 36(4) the UK Road Traffic Act 1930–34 ('the 1930 Act') and not by reason of any contract. In other words, the right given by s 36(4) of the 1930 Act is a statutory right having no connection with contract.

[64] The appellant's claim against the insurer in that case was however dismissed on the basis that he failed to serve notice to the insurance company that he had been served with summonses for dangerous and careless driving as required by the policy.

[65] The court in *Zurich* emphasised the point that s 36(4) of the 1930 Act deals with the liability of the insurer who issues the policy and not the terms of the policy which is covered by another section, namely s 10(1) of the 1930 Act which is in *pari materia* with s 96(1) of the RTA. Lord Greene MR made the following pertinent observations at p 318:

> Here is a case where Austin, a stranger to the policy altogether, paying no part of the premium and not being a party in contractual relations with Zurich at all, seeks to take the benefit of a clause in Aldridge's policy which he can only obtain by reason of a certain statutory provision. I do not think it can be suggested at this day that, apart from statute, any contract could be spelt out in circumstances such as this between Austin and Zurich.
>
> It is sufficient to refer to a passage in the judgment of GODDARD, J, as he then was, in *Tattersall v Drysdale* (1). The passage is at p 181 and starts with a quotation from GREER, LJ, in an earlier case:
>
> But GREER, LJ, says: 'I think it is quite clear that the section was intended to meet the difficulty that was patent: first, that nobody who was not a party to a contract could bring an action on the contract; and secondly, by reason of the statutory and well known law that a person who has no interest in the subject-matter of an insurance cannot claim the benefit of that insurance.' I read that passage as meaning that in his opinion the section was not only intended to effect but has effected a change in the law and gives a cause of action which hitherto did not exist to a person indicated in the policy but not a party to it, and I respectfully agree with that view.

[66] The appellant complained that the Court of Appeal in *Zainudin Mat Isa, Muhammad Haqimie* and *Aqmal* was wrong in not discussing the decision of this court in *Roslan bin Abdullah v New Zealand Insurance Company Ltd* [1981]2 MLJ 324; [1981] 1 LNS 40; [1981] 1 MLRA 445 which referred to *Peters v General Accident Fire and Life Assurance Corpn Ltd* [1938] 60 Ll L Rep 311 where it was held by the English Court of Appeal that any use of the

vehicle by the purchaser cannot be covered by the seller's insurance and that the purchaser will be insured if at all under his own policy.

[67] First of all, as we have indicated earlier in this judgment, *Roslan bin Abdullah* is of no relevance as in that case there was no insurance policy in force at the time of the accident as the policy had lapsed, unlike the present appeal where the insurance policy had not expired at the time of the accident. Secondly, this court in *Roslan bin Abdullah* was not called upon to consider provisions like s 13 of the RTA which prescribes the procedure to effect change of ownership, and s 109(1) which deems the registered owner to be the 'owner' of the motor vehicle. Thirdly, no judgment was entered against the insured in that case in order for s 9(1) of the Sarawak Motor Vehicles (Third Party Risks) Ordinance (Cap 130) ('the Sarawak Ordinance'), which is similar to s 96(1) of the RTA, to take effect.

Fourthly, *Roslan bin Abdullah* was decided in the context of the Sarawak Ordinance, which has been repealed by the RTO, which itself has been repealed by the RTA.

[68] As for the case of *Peters* which the appellant relied heavily on, we do not find the case to be of any assistance to the appellant as it was a decision based on the 1930 Act which does not contain any provision similar to ss 13(1) or 109(1) and (2) of the RTA. The definition of 'owner' in the 1930 Act (read together with the UK Road Traffic Act 1934) is also materially different from the definition of 'owner' in the RTA. Furthermore, the court in that case was more concerned with s 10(1) of the 1930 Act which is the equivalent of s 96(1) of the RTA which reads:

> 96(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person to whom the policy has been effected, judgment in respect of such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[69] For all the reasons aforesaid and on the authorities, our answer to the leave question is in the affirmative, that is to say, the registration does impose liability on the insurer notwithstanding the fact that the insured ceased to have insurable interest in the motor vehicle at the time of the accident.

APPEAL NO 2: PACIFIC & ORIENT INSURANCE CO BHD & ANOR V MOHAMAD RAFIQ MUIZ BIN AHMAD HANIPAH

[70] Four leave questions were posed in relation to this appeal, and they are:

Leave question 1:

> Is an insurer bound to serve the cause papers relating to the application for a declaration pursuant to section 96(3) of the Road Transport Act 1987 upon the third party claimant, every time that an insurer finds it necessary to make the said application or is the insurer only bound to serve the said cause paper relating to the application for a declaration pursuant to section 96(3) of the Transport Act 1987 upon the third party claimant, only when the third party claimant had already obtained judgment against the insured/rider since by obtaining the said judgment the third party claimant has then obtained a legal interest as against the insurer?

Leave question 2:

> Is the Court of Appeal correct in law in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya binti Asbam) & Ors* [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659 when it failed/refused to refer to the decision of another Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 (although referred to it) and which judgment in *Letchumanan* held that whilst an insurer has a right to disclaim liability as against the insured for breach of policy conditions, whether the third party claimant's right as against the said insurer are protected by the third party claimant's rights in filing proceedings for the damages awarded against the said insured based on the third party claimant's vested right pursuant to section 96(1) of the Road Transport Act 1987?

Leave question 3:

> Whether registration imposes liability on an insurer notwithstanding the insured having ceased to have an insurable interest in the vehicle at the time of accident?

Leave question 4:

> Is the Court of Appeal in *Muhamad Haqimie Hasim & Anor v Pacific & Orient Insurance Co Berhad* [2018] MLJU 629; [2018] 1 LNS 627 correct in law in applying section 13 and section 109 of the Road Transport Act 1987 to civil liability of an insurer pursuant to section 96(1) of the Road Transport Act when the said sections are applicable to criminal prosecutions pursuant to the Road Transport Act 1987?

[71] The facts are as follows. On 30 January 2014, the respondent as rider of motorcycle registration No WRP 8601 was involved in an accident with motorcycle registration No JMJ 5436 ridden by one Mohd Faiz bin Muhammad Nazri, the insured's rider (not party to this action). JMJ 5436 was

registered in the second appellant's name and was insured by the first appellant. The insurance policy for JMJ 5436 covered third party risks for the period between 17 June 2013 to 16 June 2014, which therefore covered the date of the accident on 30 January 2014.

[72] The respondent commenced a tortious claim for special and general damages against the insured rider of JMJ 5436 and its registered owner (second appellant) at the Bandar Baru Bangi Magistrates Court.

[73] Upon notification of the accident, the first appellant appointed Jaya Adjusters Sdn Bhd ('the adjusters') to investigate the accident. The adjusters' investigation report revealed the following:

(a) on 27 October 2011 the registered owner of JMJ 5436 (second appellant) sold the motorcycle to one Nor Mohammed bin Mohd Yusof for a cash consideration of RM5,000 but failed to register the transfer of ownership to the new owner at the JPJ; and

(b) the registered owner of JMJ 5436 (second appellant) was not aware of the accident.

[74] Based on the adjusters' report, the first appellant commenced an action under s 96(3) of the RTA at the Kuala Lumpur High Court naming the owner and insured of JMJ 5436 (second appellant) as parties to the proceedings. However, the respondent as the accident victim was not named as a party. Nor was he served with the cause papers of the action.

[75] On 26 October 2016, the first appellant successfully obtained a declaratory order under s 96(3) of the RTA from the Kuala Lumpur High Court which declared the insurance policy to be void and unenforceable for the following reasons:

(a) the registered owner of JMJ 5436 (second appellant) failed to disclose to the first appellant the sale of the motorcycle to Nor Mohammed bin Mohd Yusof;

(b) there was absence of insurable interest at the time of the accident due to the sale of the motorcycle by the owner (second appellant) to Nor Mohammed bin Mohd Yusof; and

(c) at the time of the accident, the motorcycle was ridden by the insured's rider (not party to this action) without the consent or authorization of the owner of JMJ 5436 (second appellant).

[76] In the circumstances, it was held by the Kuala Lumpur High Court that the first appellant was not liable to satisfy the judgment sum obtained by the

respondent against the insured from the Bandar Baru Bangi Magistrates Court. The first appellant relied on the decision of the High Court in *Yeap Tick In v Pacific & Orient Insurance Co Bhd* [2020] 3 MLJ 449 to submit that the High Court order under s 96(3) of the RTA operated as a complete defence to the respondent's claim.

[77] After obtaining the order, the first appellant then instructed its solicitors defending the insured (second appellant) and rider of JMJ 5436 at the Bandar Baru Magistrates Court to discharge themselves on the basis of a transfer of interest.

[78] The respondent however proceeded with his claim in the Bandar Baru Bangi Magistrates Court, and on 17 July 2017 the Bandar Baru Bangi Magistrates Court allowed his claim and found liability to be 100% against the owner (second appellant) and the rider of the motorcycle involved in the accident.

[79] Thereafter the respondent commenced proceedings in the Kuala Lumpur High Court for an order to quash the declaratory order obtained by the first appellant and to declare the policy issued by the first appellant to be valid and that the first appellant shall be liable to pay the judgment sum obtained by the respondent from the Bandar Baru Bangi Magistrates Court.

[80] The High Court granted the order sought for by the respondent, relying on the decision of the Court of Appeal in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya binti Asbam) & Ors* [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659. Being dissatisfied with the decision of the High Court, the first appellant then appealed to the Court of Appeal. Its appeal was dismissed with costs, hence the present appeal before us.

[81] The first appellant's argument in relation to leave question 1 was as follows:

(a) the application by the respondent for a declaration that the policy issued by the first appellant to be valid and that the first appellant shall be liable for the judgment obtained by the respondent from the Bandar Baru Bangi Magistrates Court should not have been granted by the Kuala Lumpur High Court as it is a vested right of the first appellant pursuant to s 96(3) of the RTA to apply for and to obtain the order and only the insured (who was served with the application and who refused to attend) had the right to apply to set aside the order dated 26 October 2016 since the respondent had the remedy to file recovery proceedings;

(b) the declaratory order was only effective between the insured (second appellant) and the first appellant and did not bind the respondent, relying on the unreported decision of the Court of Appeal in *Pacific & Orient Insurance Co Berhad v Kumari a/p Nadason & Anor* [2015] MLJU 2163;

(c) by asking for a general order that the policy be declared valid and enforceable against all persons at large, the prayer asked for was totally wrong as it applied even to bind the insured who himself did not apply to set aside the order, and by having granted the order prayed for by the respondent, the High Court had deprived the first appellant of the right to recover from its insured (second appellant) a claim to indemnity as provided for under the contract, citing *Muhammad Zaihasri bin Hassan v Pacific & Orient Insurance Co Bhd* [2018] 8 MLJ 739;

(d) the Court of Appeal was wrong in accepting the Court of Appeal's decision in *Rasip bin Hamsudi* and rejecting the decision of the High Court in *Pacific & Oriental Insurance Co Bhd v Azhar bin Azizan (Mohd Ashraf Yusoff, as intervener)* [2015] 10 MLJ 532 ('Azhar bin Azizan') which was upheld by both the Court of Appeal and the Federal Court. It was submitted that this court should endorse *Azhar bin Azizan* which decided that since the insurer had obtained a declaratory order to declare the policy void, the defendant could not apply to set it aside;

(e) the decision of the High Court in *Azhar bin Azizan* was accepted as correct by the Court of Appeal in *Mohamad Asyraf bin Yusoff v Pacific & Orient Insurance Co Bhd* and *Azhar bin Azizan* (Court of Appeal) (Civil Appeal No W-02(IM)(NCVC)-2713–12 of 2013) when it dismissed the appeal against the decision. The third parties' applications for leave to the Federal Court in *Mohamad Asyraf bin Yusoff v Pacific & Orient Insurance Co Berhad* and in Azhar bin Azizan (Federal Court) (Application No 08(i)-458–09 of 2014(W)) were refused by the Federal Court;

(f) based on the decision in *Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd* [2018] 5 MLJ 204 the decision of the High Court in *Azhar bin Azizan* has now become the decision of the Federal Court and the Court of Appeal in *Rasip bin Hamsudi* ought not to have interfered and refused to follow the decision in *Azhar bin Azizan*;

(g) just as in *Scott & English* where the leave application to the Federal Court was dismissed, the Court of Appeal ought not to have rejected the decision of the Federal Court in *Azhar bin Azizan* on the basis that there was no written grounds of judgment which was what was held in *Rasip bin Hamsudi*;

(h) based on the binding authority of this court in *Scott & English,* the decision of the Court of Appeal in *Rasip bin Hamsudi,* which refused to follow *Azhar bin Azizan* and giving its own interpretation to the proviso

to section 96(3) must, in the words of this court in *Scott & English,* be held to be decided without jurisdiction and therefore ought not to be followed;

(i) *Rasip bin Hamsudi* ought not to be accepted by this court for the following reasons:

(i) in breach of natural justice the Court of Appeal declined to consider the irregular judgment of the sessions court obtained against the insurer, but on the contrary considered the issue whether the declaratory order was regularly obtained and the Court of Appeal held that based on the fact that judgment had already been obtained against the insurer, the declaratory order was therefore not regularly obtained because the insurer had failed to comply with the proviso to s 96(3) of the RTA in failing to serve the declaratory papers on the claimants since the claimants had already obtained judgment against the rider and the insured;

(ii) the Court of Appeal misdirected itself in failing to consider that the initial judgment against the insured at the sessions court was irregular but instead held that since judgment had already been taken against the insured and rider, unless stayed or reversed, the claimants were entitled to immediately enforce the judgment;

(iii) the law allows an insurer, when dissatisfied with the conduct of its insured either for fraud or transfer of interest or for whatever reason the insurer decides as giving grounds, to obtain the declaratory order pursuant to s 96(3) of the RTA.

[82] We have dealt with the issues raised in leave questions 3 and 4 when dealing with the sole leave question in Appeal No 1 and we shall not repeat what we have said there save to say that it applies to the instant appeal. There is therefore only leave questions 1 and 2 left to be considered.

[83] Before dealing with the two leave questions, we shall first deal with the first appellant's contention that *Rasip bin Hamsudi* was decided without jurisdiction on the ground that it did not follow *Azhar bin Azizan* (leave question 2) which according to learned counsel has now become the decision of this court since the third party's application for leave to appeal against the decision of the Court of Appeal in that case was refused by this court.

[84] With due respect, we do not think that is a correct statement of the law. First of all, the Court of Appeal in *Azhar bin Azizan* did not provide any grounds for affirming the decision of the High Court and dismissing the intended intervener's appeal. A decision without the grounds of judgment

cannot be regarded as authoritative and binding: see *Tirumeniyar a/l Singara Veloo* at para 56 above.

[85] Secondly, the refusal of leave by this court does not mean approval of the decision of the Court of Appeal. For this proposition, suffice it if we refer to the decision of this court in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257; [1999] 1 CLJ 325 where Edgar Joseph Jr FCJ delivering the judgment of the court said:

> Having said that, we hasten to add, in the words of Lord Diplock speaking in the House of Lords in *Modem Engineering v Gilbert-Ash* [1974] AC 689 at pp 715–716: 'Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal — neither more or less'. With this statement of principle we respectfully agree. The natural tendency, therefore, to claim that a judgment of the Court of Appeal which has been the subject of an unsuccessful application for leave carries greater authority than one which has gone unchallenged, must be resisted.

[86] As for the two leave questions, we shall deal with leave question 2 first before dealing with leave question 1 as it can be dealt with quite shortly. The answer to question 2 is in the judgment of this court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 where the Peh Swee Chin FCJ delivering the unanimous decision of the court made the following observations:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v Bristol Aeroplane Company, Limited* [1944] KB 718. The part of the decision in *Young v Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956, *vide* its s 3.
>
> To recap, the relevant *ratio decidendi* in *Young v Bristol Aeroplane's* case is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane*

when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane.*

A few words need to be said about a decision of Court of Appeal made *per incuriam* as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed, MR in *Morelle v Wakeling* [1955] 2 QB 379, 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind that the year of *Morelle*'s case is 1955 whereas s 3 of the Civil Law Act was enacted in 1956. The ration in *Morelle*'s case is also part of the common law applicable to us.

[87] There was therefore nothing wrong for the Court of Appeal in *Rasip bin Hamsudi* to refuse to follow or to omit to refer to the decision of another Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 although referred to it by learned counsel in his submissions.

[88] In any event, we are inclined to agree with the reasoning in *Rasip bin Hamsudi* rather than the reasoning in *Letchumanan a/l Gopal.* In the first place, the issue in *Letchumanan a/l Gopal* is markedly different from the issue in *Rasip bin Hamsudi.* In *Letchumanan a/l Gopal,* the focus of the Court of Appeal's attention was on the issue of whether the victim of the road accident was in the employment of the company which owned the lorry involved in the accident. Since he was not, it was held that the insurance company was not liable for the negligent act of the lorry driver.

[89] It will be noted that the insurer in *Letchumanan a/l Gopal* relied on an exception to a liability clause in its insurance policy which stipulated that the insurer would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. This, with respect, appears to be an attempt to contract out of statute, which is prohibited by s 94 of the RTA. Further, there was no mention, let alone a discussion on s 96(3) of the RTA. *Rasip bin Hamsudi* on the other hand dealt extensively with both s 96(1) and s 96(3) which are precisely the issues that we are concerned with in the present appeal.

[90] *Letchumanan a/l Gopal* is therefore of no assistance to the appellant. The answer to leave question 2 is therefore in the affirmative, that is to say, the Court of Appeal in *Rasip bin Hamsudi* was correct in not referring to *Letchumanan a/l Gopal* although referred to it in submissions. At any rate we are not aware of any law that requires the court to refer to every authority cited by counsel in submissions.

[91] As for leave question 1, it starts off on a wrong footing by asking the question whether an insurer is bound to serve the cause papers relating to the application for a declaration pursuant to s 96(3) of the RTA upon the third party claimant 'every time that an insurer finds it necessary to make the said application', implying that it is up to the insurer to decide whether and when to serve the cause papers, either before or after judgment had been obtained against the insured by the third party claimant.

[92] Section 96(3) is reproduced again below for ease of reference:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[93] Perhaps a good starting point in dealing with this issue is the case of *Merchants' and Manufacturers, Insurance Co Ltd v Hunt and Others* [1941] 1 All ER 123 where the English Court of Appeal was called upon to consider s 10(3) of the 1930 Act which is substantially similar in purport to s 96(3) of the RTA. This is how Scott LJ expressed his view in that case:

> This legislation was obviously intended to effect, inter alia, a fair compromise between the two desirable but conflicting objects — namely on the one hand that of protecting the public from danger of impecunious tortfeasors on the roads, and on the other hand, that of avoiding the injustice of putting on a wholly innocent and misled insurer the whole pecuniary burden of a policy which, neither in law nor in equity, is his policy.
>
> However, it would have been unfair to confer this relief unconditionally. There was an obvious danger of the injured party being deprived of the pecuniary safeguard which was the subject of subsect (1) through the possibility of the policy being avoided in the proceedings under the first part of subsect (3) without his knowledge, and even by collusion between the insurer and the insured.
>
> It was essential that he should be given the right to appear in it and there defend his rights. Both the requisites are met by the proviso to subsect (3) which in effect creates two condition precedents to the existence of the insurer's right to get this declaration under the first part of the subsect (3).
>
> The third party gets full notice of the grounds of the insurer's claim and given unqualified right to become a party in all the rights of a party to an action without any qualification upon them.

A **[94]** Section 96(3) of the RTA speaks of a declaration obtained by the insurer 'before the date the liability was incurred', meaning to say before judgment in the tortious claim by the third party claimant is obtained against the insured and the tortfeasor. To that extent the provision is clear and unambiguous, which explains why the first appellant proceeded with the application under B s 96(3) after the respondent had commenced the tortious claim against the insured rider and owner of the motorcycle (second appellant) in the Bandar Baru Bangi Magistrates Court and before judgment was obtained by the respondent as the third party claimant.

C **[95]** The point to note is that while s 96(3) gives the insurer the right to obtain a declaration that the insurance policy is void and unenforceable, s 96(1) makes it mandatory for the insurer to make payment after judgment had been obtained against the insured by the third party claimant. Judgment here means D judgment in an action for negligence filed by the third party claimant and not judgment in any other cause of action.

[96] What s 96(3) mandates is that where the insurer intends to repudiate liability under the policy, it must comply with the following procedural E requirements:

(a) notice must be given to the plaintiff in the tortious claim action before liability is incurred;

(b) the notice must state the grounds relied on by the insurer to obtain a F declaration;

(c) the notice must be served on the plaintiff in the tortious claim within seven days after the commencement of the claim; and

(d) the notice must be served on the parties who have interest in the G proceedings.

[97] In the present case, the first appellant knew of the pending Bandar Baru Bangi Magistrates Court proceedings against the rider and registered owner of the motorcycle (second appellant), yet it chose not to comply with the H statutory requirements laid down by the proviso to s 96(3). The cause papers which ought to have been served on the respondent who was the plaintiff in the Bandar Baru Bangi Magistrates Court proceedings were not served on him. This was an outright contravention of s 96(3), rendering the declaration order issued by the High Court irregular, defective and unenforceable. The first I appellant had no discretion not to comply with the proviso to s 96(3). Nor does the court have the discretion to allow any such application which suffers from such fundamental defect.

[98] In *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria*

Demadu [2021] 1 MLJ 303 Her Ladyship Mary Lim Thiam Suan JCA (now FCJ) delivering the judgment of the Court of Appeal had this to say on s 96(3) at paras 68–69:

> [68] The appellant was well aware of the procedure in s 96(3) and the obligation to serve together with the grounds relied on for avoiding its obligations to satisfy a judgment obtained by a third party. In fact, at no time did the appellant plead ignorance of that duty; it just takes the position that its action was valid. Furthermore, this is not a case of timing of such applications, that is, when such orders ought to be sought. And yet, the appellant failed and/or ignored that obligation. It has only itself to blame.
>
> [69] Thus, we unanimously conclude that the mandatory requirements in the proviso to s 96(3) have clearly not been met by the appellant. As a result of that non-compliance, and in relation to the respondent, the appellant cannot avail itself to the benefit of s 96(3). The appellant is not entitled to the benefit of s 96(3) of the Road Transport Act 1987.

[99] Thus, the first appellant's failure to comply with the proviso to s 96(3) disentitled it to the benefit of the provision. It was however urged upon us that the High Court case of *Azhar bin Azizan* should be accepted as good law, which decided that since the insurer had obtained a declaratory order to declare the policy void, the defendant could not apply to set it aside.

[100] With due respect, we do not see how *Azhar bin Azizan* is relevant to the issue before us as the facts are poles apart from the facts of the present case. In the first place, no judgment had been obtained against the insured in that case to entitle the intended intervener to enforce payment of the judgment sum pursuant to s 96(1) of the RTA. The predominant issue in that case was whether the claimant or the plaintiff in the tortious claim proceedings was entitled to intervene and set aside the declaratory order obtained by the insurer after the declaration proceedings had ended.

[101] Of more significance to note is that the learned judge in that case failed to direct his mind to the mandatory requirements laid down by the proviso to s 96(3). The judgment was therefore made *per incuriam.* It is trite law that a judgment that is made *per incuriam* has no binding effect and need not be followed: see *Young v Bristol Aeroplane Company, Limited* [1944] KB 718 cited with approval by this court in *Dalip Bhagwan Singh.* The proviso to s 96(3) must be read having regard to the section itself: See *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 (FC).

[102] The first appellant had another argument. It was contended that the respondent as the third party claimant could not apply to set aside the order pursuant to O 35 r 1(2) of the Rules of Court 2012 because he had a specific remedy provided by s 96(1) of the RTA to file for recovery against the insurer.

The argument must fail. There is nothing in s 96(1) to say that the third party claimant must first obtain another judgment against the insurer before he could proceed to enforce the judgment that he had earlier obtained against the insured. After all, the judgment debt of the insured becomes the judgment debt of the insurer: see *Pacific & Orient Insurance Co Berhad v Kamacheh a/p Karuppen* [2015] MLJU 72; [2015] 4 CLJ 54. The insurer is bound to settle the judgment sum without the need for another action by the third party claimant, ie recovery action against the insurer once the conditions in s 96(2) and (3) are fulfilled.

[103] Therefore, the question of the respondent having to file for recovery proceedings under s 96(1) against the first appellant as contended by learned counsel does not arise at all: see also the decisions of the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 and *Yeap Tick In* which decisions on this point we are in agreement with. In *Muniammah Muniandy*, this is what Ramly Ali JCA (as he then was) said:

> [21] Nowhere does s 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. Therefore, the question of the respondent having to file a recovery proceedings under s 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.

[104] In an application for a declaratory order under s 96(3), the insurer must confine itself to the particulars it sets out in the notice served on the plaintiff in the tortious claim proceedings. The reason for this according Lord Greene in *Zurich* is this:

> True it is that the proviso to sub-s 3 does not in terms say that, as against the third party, the insurer is to be confined to the particulars set out in the notice. The reason for this is that it was quite unnecessary for it to do so. If the insurer could as against the third party, bring forward matters not specified in the notice the protection which the proviso gives could be rendered completely abortive ...
>
> If I am right in thinking that only matters referred to in the notice can be relied on, it seems to me to follow that the question whether such matters are material and whether the policy was obtained by them must be examined on the artificial basis that, as between the insurer and the third party, all other material facts as having been disclosed. The result is to prevent the insurer from relying either directly or indirectly on any other matter not specified in the notice as a ground or part of a ground for avoiding the policy as against the third party.

[105] Goddard LJ in the same case emphasised the importance of time within which the notice must be served other than the content of the notice, and he went on to say:

> It seems to me that what the legislature had in mind was that, if an insurer was intending to repudiate a policy, it was only fair that the injured party should know the grounds on which reputation was sought before he went to the expense of endeavouring to establish his claim against the insured, who, if not entitled to indemnity, might be unable to satisfy a judgment. It was to prevent an injured party incurring further useless expense. Hence, the necessity of the notice prescribed by the proviso to the subsection. The protection afforded is little enough.

[106] In the present case, neither the notice nor the cause papers for the s 96(3) application were served on the respondent by the first appellant, in breach of the proviso to s 96(3), which as we said makes the first appellant's repudiation of the insurance policy based on the declaration order it obtained from the High Court unsustainable in law.

[107] In the premises, the answer to leave question 1 is this: the insurer is bound to serve the cause papers relating to the application for a declaration pursuant to s 96(3) of the RTA on the third party claimant before the third party claimant obtains judgment against the insured and the tortfeasor.

APPEAL NO 3: JESUDAS A/L PALANISAMY V PACIFIC & ORIENT INSURANCE CO BHD

[108] For this appeal, the question for determination is as follows:

> Whether the insurer is entitled to derive the benefit of their declaration obtained by them pursuant to section 96(3) of the Road Transport Act 1987 against the third party when they failed to comply with the proviso of section 96(3) of the Transport Act 1987?

[109] The answer to the leave question is obvious from our answer to leave question 1 in Appeal No 2. It follows that the answer to the leave question is in the negative, that is to say, the insurer is not entitled to the benefit of the declaration order it obtained under s 96(3) when it failed to comply with the proviso to the section.

[110] That disposes of the appeal, but for context it is necessary to set out the facts of the case. They are as follows. On 3 June 2016, the respondent insurer obtained an order in terms for its application by way of originating summons filed at the Kuala Lumpur High Court to declare the policy of insurance issued to the insured as null and void. The application was to state that being the insurer to motorcycle bearing registration No PFK 1477 it would not provide any coverage for the road accident which occurred on 14 January 2015.

A **[111]** The respondent's solicitors Messrs K Suganthi & Co who was appointed by the respondent to defend the defendants in the tort action to act as defence counsel on 1 September 2016 obtained an order to withdraw itself from acting for the defendants in the tort action. This would mean that the owner and rider of the motorcycle bearing registration No PFK 1477 were left
B in the lurch so to speak and told to fend for themselves, despite the existence of a valid insurance policy issued by the respondent.

[112] The tort action however proceeded on the issue of liability and quantum, at the conclusion of which the Jawi Magistrates Court found liability
C to be 100% against both the owner and rider of motorcycle registration No PKF 1477. The learned magistrate awarded a sum of RM54,000 for general damages and a sum of RM21,921 for special damages.

D **[113]** Since the judgment could not be enforced against the respondent, the appellant filed for a declaration order at the Kuala Lumpur High Court but the High Court held that the appellant should file recovery proceedings so that the respondent could re-ventilate the allegation of fraud.

E **[114]** Dissatisfied with the outcome of the declaration application, the appellant filed an appeal to the Court of Appeal on the ground that the respondent failed to comply with the mandatory procedural requirements of s 96(3) of the RTA and because of that failure, the respondent could not derive the benefit of s 96(3) of the RTA.

F **[115]** The appellant's appeal was dismissed by the Court of Appeal. No grounds were given by the Court of Appeal. It was against that decision of the Court of Appeal that the appellant filed the present appeal to this court.

G **[116]** There were other issues of law raised by learned counsel for the respondent in opposing the appellant's appeal, including the issue of fraud, the doctrine of *uberrimae fidei* and whether the question of law raised is premature both in his written submissions and in his oral argument, but given the respondent's breach of s 96(3) for failing to comply with the proviso to the
H section, which is fatal, we do not find it necessary to deal with any of those questions.

[117] In any event, the questions do not come within the ambit of the single leave question. It is true that this court being the court of last resort has a
I discretion to permit the respondent to argue grounds which fall outside the scope of the leave question in order to avoid a miscarriage of justice but the discretion must be exercised judiciously and sparingly and in very limited circumstances in order to achieve the ends of justice: see *Melawangi Sdn Bhd v Tiow Weng Theong* [2020] 3 MLJ 677; [2020] 4 CLJ 1 (FC). We do not find

this to be a fit and proper case for us to exercise the discretion in favour of the respondent. What needs to be appreciated is that it is not a right for a party to the appeal to pursue its case on questions of law for which no leave had been granted by this court.

APPEAL NO 4: MOHAMAD ZULKARNAIN BIN MUSTAFA V ALLIANZ GENERAL INSURANCE COMPANY (M) BHD & 2 ORS

[118] There were three leave questions posed for our determination in this appeal. They are as follows:

Leave question 1:

> Whether in allowing the section 96(3) application dependent on core issues for negligence which was yet to be determined by another forum (a trial court), the High Court breached the victim-Appellant's right to equality enshrined in Article 8 of the Federal Constitution?

Leave question 2:

> Where an insurer's section 96(3) RTA application turns on whether an insured (Defendant) was ever involved in an accident (in tort complained of) as 'a matter of policy-or-law-should' the High Court dismiss the application on the grounds that a separate tribunal is about to determine the issue by way of *viva voce* evidence?

Leave question 3:

> Whether a section 96(3) application is only to determining the issue of 'voidness and unenforceability' of an insurance contract on the grounds of established contractual principles and are not to be exploited to determine core factual issues in the tort of negligence which is a matter entirely outside the grounds contemplated by section 96(3) RTA?

[119] The facts are bizarre we must say. Thirty minutes past midnight on 21 December 2015, a road accident occurred between the appellant's motorcycle registration No AJW 5727 and the third respondent's motorcycle registration No AHW 5937 owned by the second respondent. The first respondent was the insurer for the second respondent's motorcycle.

[120] The third respondent made three police reports on 3 March 2016, five months before the appellant filed a writ action in the Teluk Intan Sessions Court on 18 August 2016. In the first report, the third respondent admitted that he collided into the rear of the appellant's motorcycle. In other words, he admitted that he was involved in the accident while riding motorcycle registration No AHW 5937. He then made two corrective reports, the first to change the location of the accident and the second, to change the year of the accident. There was however no change in the identity of the motorcycle

involved in the accident. It remained motorcycle registration No AHW 5937 belonging to the second respondent.

[121] Almost a year later on 8 February 2017, the third respondent made a fourth police report. This time he changed the identity of the motorcycle involved in the accident from motorcycle registration No AHW 5937 belonging to the second respondent to motorcycle registration No WUW 9865 belonging to his wife, which had no insurance coverage.

[122] The third respondent also affirmed a statutory declaration alleging that the three police reports that he lodged on 3 March 2016 were all false. In other words, he now admitted that he was involved in the accident but not while riding motorcycle registration No AHW 5937 but while riding motorcycle registration No WUW 9865. The second respondent (the insured) and an alleged third party witness supported the third respondent's statement by separate statutory declarations.

[123] On 18 August 2016, the appellant commenced a writ action in the Sessions Court at Teluk Intan against the third respondent (rider of the motorcycle) and the second respondent (owner of the motorcycle registration No AHW 5937).

[124] At the trial in the Teluk Intan Sessions Court, the police Investigation Officer ('IO') testified that the third respondent was involved in the accident, directly contradicting the third respondent's fourth police report that he and motorcycle registration No AHW 5937 were not involved in the accident.

[125] On 9 March 2017, ie one month after the IO's testimony was given, the first respondent filed an originating summons in the Kuala Lumpur High Court pursuant to s 96(3) of the RTA to apply for a declaration that the insurance policy was void and unenforceable, thus throwing a spanner in the works for the writ action filed by the appellant in the Teluk Intan Sessions Court. The application was made solely on the ground that the third respondent (defendant at the trial in the Teluk Intan Sessions Court) was not involved in the accident.

[126] On 17 april 2017, the first respondent amended the s 96(3) originating summons to include the appellant as a party. The first respondent's prayers in the originating summons action were:

(a) the insurance policy for the motorcycle bearing registration No AHW 5937 was void and unenforceable in respect of the accident; and

(b) the first respondent was not responsible for satisfying any order or judgment arising from the civil action in the Teluk Intan Sessions Court and/or any other claim arising from the accident.

[127] It is obvious that prayer (b) above was a pre-emptive strike at the impending judgment of the Teluk Intan Sessions Court. The first respondent's basis for making the s 96(3) application was that the second respondent (the insured) knew of the false police report lodged by the third respondent (the rider), and because of that both he and the third respondents were in breach of the principle of *uberrimae fidei,* thus rendering the insurance policy issued in respect of motorcycle registration No AHW 5937 null and void and unenforceable against the first respondent.

[128] Learned counsel for the first respondent stressed the point that the Loss adjusters appointed by the first respondent had found out that the third respondent and the motorcycle registration No AHW 5937 were not involved in the accident. For some unexplained reason however the adjusters' report was not produced in the originating summons action. Nor was the maker of the report called to testify.

[129] The first respondent alleged the following in the adjusters' investigation:

(a) the third respondent made a statutory declaration on 8 February 2017, which was one day after the IO's witness statement was marked, stating that:

(i) the motorcycle that the third respondent rode during the accident was not AHW 5937 but instead motorcycle registration No WUW 9865 owned by his wife;

(ii) the insurance and the road tax for the motorcycle WUW 9865 had expired; and

(iii) the second respondent's motorcycle registration No AHW 5937 was allegedly never involved in the accident. Instead, it was between the appellant and another motorcycle. Only upon reaching close to the appellant, who was lying on the road, did the third respondent collide into him.

[130] As we have already mentioned, the third respondent on the same day, ie on 8 February 2017 made a correction to his police report to say that the motorcycle involved was WUW 9865 owned by his wife and not motorcycle registration No AHW 5937 owned by the second respondent. The second respondent had also made a statutory declaration on 13 February 2015, ie five days after the third respondent made the corrective police report in support of

A the third respondent's new version of the story.

[131] There was another twist to the first respondent's narrative. An alleged independent witness, one Nik Maharith, made a statutory declaration on 22 February 2017, two weeks after the IO confirmed during the trial at the
B Teluk Intan Sessions Court that there was no independent witness to the accident, claiming that:

(a) he saw an accident after which a Malay man fell on the road. Then the third respondent, on a motorcycle bearing registration No WUW 9865,
C collided into the appellant;

(b) he identified the third respondent as his friend and took him to the clinic using his friend's RXZ motorcycle registration No WFN 3498; and

(c) the accident involved Yamaha RXZ No WUW 9865 ridden by the third
D respondent and not Honda EX-5 registration No AHW 5937.

[132] Based on this new version of the story, the first respondent argued at the originating summons hearing that:

E (a) the insurance policy became void and unenforceable because the third respondent made a false police report, with the second respondent's knowledge, that the motorcycle registration No AHW 5937 (covered by the policy) was involved in the accident; and

(b) the second and third respondents were bound by the principle of
F *uberrimae fide* towards the first respondent to make a full and accurate disclosure on all rights and obligations which could make the first respondent liable pursuant to the insurance coverage between the first respondent and the second respondent.

G **[133]** At the risk of being repetitious, the thrust of the argument was that since the second and third respondents breached their duty of utmost good faith, the third party insurance policy was rendered null and void and unenforceable against the first respondent, with no regard to the fact that the appellant as the accident victim and third party claimant had nothing to do
H with the alleged false police report lodged by the third respondent, who himself (third respondent) had no contractual relationship with the first respondent. It is surprising that the first respondent chose to accept as gospel truth the third respondent's conflicting evidence on his involvement in the accident as a basis for its application to repudiate liability under s 96(3) of the RTA.

I **[134]** Given the object and purpose of the statutory third party risks insurance policy, which is to protect third parties against risks arising out of the use of motor vehicles, we do not think the first respondent can be allowed to exploit s 96(3) in the manner it did in this case. The grant of the declaration

under s 96(3) to the first respondent was grossly unfair to the appellant who, as it turned out, succeeded in proving his claim against the second and third respondents after a full trial of the action in the Teluk Intan Sessions Court, entitling him to be paid the judgment sum under s 96(1). In any case, the declaratory order obtained by the first respondent from the High Court only binds itself and its insured and not the appellant.

[135] There was in this case an obvious danger of a collusion between the insurer and the insured (per Lord Scott LJ in *Hunt and Others*) to deny the appellant of the fruits of his litigation. The trial court's finding after a full trial that the third respondent and motorcycle registration No AHW 5937 were involved in the accident proves that the first respondent (the insurer) had unwittingly relied on false evidence at the s 96(3) originating summons hearing.

[136] As for the second and third respondents, their opposition to the appellant's appeal was based on the following two grounds:

(a) the appellant failed to procure leave to cross-examine them on their statutory declarations and affidavits in reply filed in the High Court at the originating summons application filed by the first respondent; and

(b) the appellant failed to seek an order to convert the originating summons filed by the first respondent to a writ action so that the appellant had the opportunity to cross-examine both of them.

[137] It was their contention that the issue before this court is not whether the third respondent was involved in the accident but whether they had breached the duty of *uberrimae fidei*. This line of argument is not only inconsistent with the first respondent's case that the third respondent was not involved at all in the accident but is without merit and must be rejected. The argument is as good as saying that it is not this court's concern if the third respondent was involved in the accident as the court's concern is only to find out if they (the second and third respondents) were in cahoots in breaching their duty of *uberrimae fidei to* the detriment of the first respondent.

[138] With due respect, that cannot be right as the core issue to be addressed by the court is whether the third respondent was liable in negligence and not whether the second and third respondents were in breach of their duty of *uberrimae fidei* to render the insurance policy null and void and unenforceable against the first respondent. The issue before the trial court was one of tort and not of contract. Even if there was a breach of the *uberrimae fidei* duty on the part of the second and third respondents, it does not entitle the first respondent to deny liability to the innocent third party claimant (the appellant) for compensation in the face of ss 90, 91(1)(b), 94, 95 and 109 of the RTA.

[139] As for the second and third respondents' contention that the appellant failed to procure leave to cross-examine them on their statutory declarations and affidavits in reply at the originating summons hearing, we do not see how the failure is fatal to the appellant's case given the serious contradictions in the third respondent's evidence, which were never explained save for him to say that his initial police reports were false. This casts grave doubts on his credibility and reliability as a witness.

[140] The rule laid down in the oft-cited case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA), which followed *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; [1986] CLJ Rep 45; [1986] 1 CLJ 2 (FC) and *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 (HC) that in a contest of affidavits material allegations which are not contradicted are deemed to be admitted could not have been intended to apply where the material allegations are manifestly unreliable. Such evidence is unworthy of credit and must be disregarded by the court.

[141] Our attention was drawn to the following passage in the judgment of the High Court in the present case where the learned judge who heard the s 96(3) application said:

> The court cannot be expected to accept the evidence of the Investigation Officer in the Teluk Intan Sessions Court Trial as that was the versions of the Investigation Officer. Even if the evidence of the Investigation Officer is true, it is telling against the second Defendant who had not given a full frank disclosure in relation to the said accident.

[142] With due respect, if the High Court was not expected to accept the sworn evidence of the IO at the trial, the converse is also true, that the court is not expected to accept the affidavit evidence and statutory declaration of the third respondent whose evidence on his involvement in the accident is demonstrably unreliable and highly doubtful. It is rather unfortunate that the learned judge did not give any reason for rejecting the IO's sworn evidence.

[143] In opposing the first respondent's s 96(3) application before the High Court, the appellant on his part had raised the following issues:

(a) the first respondent failed to state specifically which clause of the insurance contract was breached by the second and third respondents;

(b) a writ action had been filed in the Teluk Intan Sessions Court prior to the originating summons action;

(c) the IO in the writ action had testified that:

– the third respondent was the one who showed the location of the accident

and the motorcycle AHW 5937 to the I.O. and allowed photographs of the motorcycle to be taken; and

– the third respondent confirmed that the motorcycle No AHW 5937, which he was riding at the material time, was damaged. The investigation revealed that the damage to the appellant's motorcycle was caused by the 'crash' in the rear from the motorcycle No AHW 5937 ridden by the third respondent at the time of the accident. The I.O. confirmed this based on the third respondent's statement.

(d) the appellant would be prejudiced if the declaration was granted as the trial was ongoing;

(e) the High Court's declaration would deny the appellant a fair trial. Truth could only be known through a full trial;

(f) as the first respondent was the third defendant in the Teluk Intan Sessions Court trial by way of intervening, it had the right to cross-examine all witnesses of the appellant and so the first respondent would suffer no prejudice;

(g) the contents of the third respondent's statutory declaration were not incorporated in a formal police report. Thus, there was no police investigation;

(h) who caused the third respondent to change the entire version in his earlier police report?

(i) it was an afterthought for the third respondent to amend the police report (to change the registration number of the motorcycle) after more than a year since the accident took place and after the IO had completed giving his evidence in the writ action;

(j) why did the second and third respondents and the independent witness (Nik Maharith) wait for more than a year to reveal their stories? This was after the Adjuster got involved and is believed to have influenced the second respondent to change his mind;

(k) the second respondent and the independent witness merely made statutory declarations without lodging police reports to support their allegations to enable a police investigation to take place;

(l) whether the adjuster and all the respondents worked in cahoots to defeat the appellant's writ action;

(m) that the first respondent's failure to produce the adjuster's report raised suspicion as to whether something was being hidden;

(n) the third respondent failed to include the new version of the accident (as in his statutory declaration) in his two corrective police reports despite the fact that there was ample opportunity to do so;

(o) ahe principle of *uberrimae fide* was not applicable; and

(p) based on the above reasons, there were many triable issues which could only be properly decided in a full trial and not by way of a contest of affidavits. Hence, all witnesses had to give oral evidence and then tested in cross-examination before a decision could be made.

[144] On 21 July 2017, the High Court hearing the s 96(3) application by the first respondent ruled against the appellant by declaring that the insurance policy for the motorcycle registration No AHW 5937 was void and unenforceable. The appellant's appeal to the Court of Appeal against the decision was dismissed on 20 March 2019, principally on the ground that the proceedings in the Teluk Intan Sessions Court had no bearing on the originating summons proceedings and that at any rate the insured (second respondent) and rider of the motorcycle (third respondent) were not cross-examined on their statutory declarations and affidavits.

[145] Pausing here for a moment, here is a case where the appellant was a victim of a road accident through no fault of his. Before liability was determined by the Teluk Intan Sessions Court where the appellant filed his writ action, the first respondent applied for and obtained a s 96(3) declaration from the Kuala Lumpur High Court on the basis that the third respondent was not involved in the accident. But the Teluk Intan Sessions Court after hearing *viva voce* evidence in a full trial not only found the third respondent and the motorcycle registration No AHW 5937 to be involved in the accident but also found the third respondent liable for the accident and entered judgment against him.

[146] This irreconcilably conflicting finding of fact on such vital issue as liability by two courts of competent jurisdiction is unacceptable. It raises the specter of a breakdown in the law on third party risks insurance policies. Which finding is to prevail, the finding of the trial court after a full hearing or the finding of the High Court in an application under s 96(3) of the RTA?

[147] If this court were to accede to the first respondent's argument, it will mean that the finding of the High Court in proceedings under s 96(3) of the RTA must and will always prevail over the finding of the trial court in a full trial. On the other hand, if we were to accede to the appellant's argument, it will mean that the finding of the trial court must and will always prevail over the finding of the High Court in a s 96(3) application.

[148] For the appellant, the contention was as follows:

(a) s 96 of the RTA is not an automatic right. The first respondent must satisfy its burden under the section and under Schedule 9 of the Financial

Services Act 2013, which imposes the burden on the insurer to prove that there was misrepresentation, and explain what steps were taken by the insurer before and after the contract was entered into, to enable the court to consider whether there has been a waiver by the insurer;

(b) the issue of whether the defendant (third respondent) the trial court was involved in the accident was a live issue before the trial court when the High Court received the first respondent's application under s 96(3) of the RTA. It was for the trial court to decide on the third respondent's involvement in the accident and not for the High Court hearing the s 96(3) application;

(c) the High Court ought to have dismissed the s 96(3) application to prevent multiplicity of proceedings and to uphold the appellant's constitutional right to equal treatment and protection under the law. The appellant was victorious at the trial court but was unable to enforce the judgment against the first respondent;

(d) s 96 is part of a social legislation to enable the victims to enforce the judgment against the insurer. It ought not to be exploited to prejudice the appellant's trial and disrupt the enforcement of judgment. The trial court found the third respondent liable. The High Court has now given a conflicting finding which prejudices the appellant;

(e) when the High Courts are faced with s 96(3) applications premised on grounds relating to the involvement of the driver or liability of the driver, the courts ought to dismiss the application and allow the trial judge to make a determination on the issue; and

(f) a s 96(3) declaration must only be allowed in 'clear cut cases' as held in *Chu Chu @ Moksin bin Amlih (a person of unsound mind not so found by inquisition) suing by his litigation representative, Kalong bin Amih v Am General Insurance (M) Bhd & Ors* [2017] MLJU 779; [2017] 1 LNS 717 which made two points on the issue:

(i) the legislative intent of the RTA is to protect road users. Therefore, insurers do not have an automatic right to the declaration; and

(ii) the High Courts dealing with s 96(3) declaration ought to refrain from granting such orders where there is an ongoing suit to determine whether the victim ought to be insured. The trial court would assess the evidence to determine the liability.

[149] It was submitted that the present case is not a clear-cut case for disposal under s 96(3) of the RTA for the following reasons:

(a) there was a trial pending before the sessions court to determine whether the defendant (driver) was involved in the accident;

A (b) the issue of liability in an accident cannot be determined by affidavit evidence;

(c) there was serious conflict in the evidence as the third respondent made two corrective police reports altering his initial police report where he admitted involvement in the accident. The second respondent also affirmed a statutory declaration in favour of the third respondent's altered version. These evidence were tested by the trial court and the trial court found the third respondent liable; and

C (d) as the High Court prematurely found that the third respondent was not involved in the accident, the declaration in favour of the insurer now deprives the appellant from enforcing the judgment against the insurer for damages. The appellant's protection under the RTA has been infringed.

D

[150] It was further submitted that issues relating to the tort of negligence, and whether the third respondent was involved in the accident using the second respondent's vehicle is to be determined during the trial in the sessions court and not by way of a s 96(3) application in the High Court.

E

[151] In *Balamoney Asoriah v MMIP Services Sdn Bhd* [2019] MLJU 2172; [2020] 1 CLJ 476, the insurance policy was renewed in the deceased's name after his demise. The accident occurred after his demise. The insurer applied to declare the policy void on the basis of a breach of *uberrimae fidei* duty F for non-disclosure of his death. It was held by the Court of Appeal that the deceased's death does not *ipso facto* invalidate the policy.

[152] In arriving at the conclusion, the court analysed the burden imposed on the insurer by Schedule 9 of the Financial Services Act 2013 ('the FSA'). It G was held that where the insurer itself is in breach either by not pursuing or safeguarding its own interest and obligations, it will not be open to the insurer to approach the court for a declaration under s 96(3) of the RTA to avoid the insurance contract. The relevant paras in Schedule 9 of the FSA are as follows:

H 5. Pre-contractual duty of disclosure for consumer insurance contracts

(1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.

I ...

(6) Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under subparagraph (1) or subsubparagraph (3)(a), or fails to confirm or amend any matter under subsubparagraph (3)(a), or does so incompletely or provides irrelevant information, as the case may be, and the

answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.

(7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

[153] The rationale for imposing the burden on the insurer was debated in Parliament as set out in the following excerpts from the *Hansard:*

Keenam, rang undang-undang ini akan menyediakan rangka kerja yang kukuh bagi perlindungan pengguna kewangan. Ini dicapai melalui:

...

(iv) memperuntukkan tanggungjawab insurans untuk memberi panduan kepada pengguna mengenai penzahiran yang diperlukan semasa peringkat pra kontrak dalam hal salah nyata atau misrepresentation yang dibuat oleh pengguna.

Pada masa sekarang, kontrak insurans boleh dielak, avoidable secara langsung oleh penanggung insurans tidak kira sama ada salah nyata oleh seorang pengguna tersebut dibuat secara sengaja atau melulu, cuai atau pun tidak sengaja.

Ketujuh, rang undang-undang ini akan menyokong pendekatan penyeliaan yang lebih bersifat pencegahan awal, prevention, ya.

Jadual 9 menyatakan kewajipan baru untuk penzahiran dan representasi bagi pengguna yang perlu dipatuhi sebelum sesuatu kontrak insurans dibuat, diubah atau diperbaharui dengan penanggung insurans. Jadual ini juga menyatakan remedy berkadar proportionate remedy yang boleh digunakan oleh penanggung insurans dalam hal salah nyata yang dibuat oleh pengguna semasa peringkat pra kontrak bergantung kepada jenis salah nyata yang dibuat.

Sama dengan syarikat-syarikat insurans, apakah kawal seliaan terhadap syarikat-syarikat insurans mengikut Akta Insurans 1967? Pada masa ini, semua syarikat insurans apabila berlaku satu tuntutan oleh pelanggan mereka, pertama sekali dia tengok bagaimana nak tolak permohonan itu, dengan izin, how to repudiate liability. Padahal, orang ambil insurans adalah untuk perlindungan semasa kejadian kecurian atau rompakan.

...

Sama macam Parlimen juga Tuan Yang di-Pertua, sebab kes-kes insurans yang boleh diselesaikan tengok kepada polisi, mesti ada niat untuk menyelesaikan kepada pencarum, kepada policy-holder dan proses claim itu, tuntutan itu. Saya rasa syarikat-syarikat insurans sebagai kartel, mereka menguasai indusri insurans ini. Sama macam dahulu.

[154] It is clear that Parliament's intention *vide* Schedule 9 of the FSA is to

provide a check and balance as a way to supervise the insurance companies, to prevent them from easily repudiating liability without reasonable cause.

[155] Learned counsel for all three respondents pressed home the point that the proceedings in the Teluk Intan Sessions Court was separate and distinct from the proceedings in the High Court pursuant to s 96(3) of the RTA and as such the Teluk Intan Sessions Court proceedings had no bearing on the outcome of the originating summons proceedings in the High Court.

[156] We find no merit in the argument. Although the proceedings in the two courts were separate and distinct, the decision of the High Court in the s 96(3) application, which stole a march from the Teluk Intan Sessions Court trial, had a direct and adverse effect on the appellant's future recovery of damages that he obtained from the Teluk Intan Sessions Court, where he came out victorious after a full hearing.

[157] The only consolation for the appellant is that no committal or other execution process may be issued to enforce the declaratory order: see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141; [2010] 1 CLJ 429. In *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, it was held by this court that the declaration obtained by the appellant in that case was only related to his legal status as a permanent resident of Sabah but was still subject to the relevant immigration laws, ie the power of the Director of Immigration Sabah to cancel the entry permit issued to him in the circumstances under the Immigration Act 1959/63 which could occur in the future. Per Lee Hun Hoe CJ (Borneo):

> The basis of the jurisdiction (for declaratory orders) is O 25 r 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion. In *Ibeneweka v Egbuna* Viscount Radcliffe in giving the decision of the Privy Council stated:
>
> > The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised 'sparingly', with 'great care and jealously,' with 'extreme caution,' with 'the utmost caution.' These are indeed counsels of moderation, even though as, Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent judges to their possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realization that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.

> In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy.

[158] We are mindful that the issues of law raised in *Datuk Syed Kechik* are not analogous to the issues of law raised in the present appeal, but its relevance in particular is in adopting the principle laid down by the Privy Council in *Ibeneweka* that declarations are not lightly to be granted. This applies with greater force to the present case where a declaration pursuant to s 96(3) of the RTA was not the only remedy available to the first respondent.

[159] We agree with learned counsel for the appellant that the High Court ought to have dismissed the s 96(3) application as the first respondent relied on facts which formed the core points of dispute between the parties in the trial court, such as whether the rider of the motorcycle was involved in the accident. The question whether the rider was involved in the accident was an issue of tort and not of contract. The legislative intent behind s 96(3) is clear, that the provision is only meant for determining issues of voidness and unenforceability of an insurance contract and cannot be exploited to determine core factual issues in the tort of negligence such as the issues of liability and damages.

[160] The facts and the evidence in the present case were so highly contested, compounded as it were by the fact that the third respondent made a complete about turn in his evidence after the IO had given evidence at the trial in the Teluk Intan Sessions Court. Surely this required determination by *viva voce* evidence in a single trial and not by two different courts as had happened in this case. These highly contested factual issues cannot suitably be resolved by way of a s 96(3) declaration as they form a crucial point of contention between the parties.

[161] The point needs to be emphasised that the third respondent changed his evidence after the Insurance adjusters came into the picture. His fourth police report and the statutory declarations in support of the first respondent's s 96(3) application were all made after the adjusters had come up with their report. This was confirmed by the first respondent's deputy manager herself, one Mona Shewandas in her affidavit in support.

[162] As the facts disclose, armed with the adjusters' report, the first respondent understandably argued fraud on the part of the insured (second respondent) and the rider (third respondent) whom it alleged were in breach of the duty of utmost good faith, thus entitling it to a declaration under s 96(3) that the insurance policy was void. But this clashes with:

A (a) the appellant's right to recovery of the judgment sum awarded by the trial court; and

(b) the first respondent's statutory duty to pay the judgment sum.

B **[163]** Learned counsel for the appellant was right in our view in pointing out that the duty to act in good faith (*uberrimae fidei*) applies equally to insurers throughout the policy period: see *Allianz General Insurance Company (M) Bhd v Mohd Fazdli bin Mohd Salleh & Ors* [2018] MLJU 900. It is hard to ignore the fact that the total change in the third respondent's initial admission of his C involvement in the accident was procured by the adjusters under very suspicious circumstances, thus raising the question whether the first respondent itself had breached its *uberrimae fidei* duty.

D **[164]** Fairness to the appellant demands that the evidence relied on by the first respondent in the s 96(3) application be tested in the pending trial at the Teluk Intan Sessions Court. The arbitrariness that had taken place has created uncertainty for the appellant's chances of recovery and this breaches his right to equality under art 8 of the Federal Constitution as the fate of the entire case was E decided not in a trial but on an originating summons.

[165] What transpired in this case has resulted in the trial court's function being rendered useless and its judgment in favour of the appellant nugatory as the s 96(3) declaration obtained by the first respondent from the High Court F defeated the judgment obtained by the appellant from the sessions court, thus leaving him with only a paper judgment that may not even be worth the paper it is printed on. That defeats the object of the RTA to protect third parties against risks arising out of the use of motor vehicles rather than to put its object into effect.

G

[166] The granting of the declaration under s 96(3) of the RTA by the High Court was a serious error of law and fact. It denied the appellant of the fruits of his litigation in the Teluk Intan Sessions Court. This has unfairly left him without adequate remedy and the point must again be emphasised that given H the serious doubts in the third respondent's evidence concerning his involvement in the accident, the correct approach would have been for the High Court to dismiss the s 96(3) application and to allow the trial court to decide on the matter, which was the approach correctly taken by Lim Chong Fong J in *Malaysia Motor Insurance Pool v Eastern Moon Enterprise & Anor* [2018] MLJU 779; [2019] 10 CLJ 230. I

[167] In that case the first issue was whether the first respondent had sold the bus to one Ramu a/l Karupiah. The learned judge held that 'since this point has already been pleaded in the suit, I am therefore of the view that it is

inappropriate that this point is dealt with here'.

[168] In *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 the then Supreme Court made the following pertinent observations on the issue of conflicts in evidence:

> (2) The conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidence which, however, was not possible in proceedings begun by originating summons. In any case, it was most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence.

[169] Guidance may also be sought from the following two cases:

(a) *Abdul Majid v Haji Abdul Razak* [1971] 2 MLJ 228 where it was held, on the facts of the case:

> (1) Questions of jurisdiction apart, courts would refuse to decide questions of fact on an originating summons as a matter of some inconvenience;
>
> (2) In the circumstances of this case, the grantor's subsequent change of heart may have led to another consensual variation. If so, then it remained for the court to find what was the actual agreement reached. If it did not, then the question remained whether the grantor had so bound himself contractually that he must be made to perform specifically any contract entered into validly by him and as varied consensually. This meant, at least, that evidence would have to be led, and therefore an originating summons was not suitable medium or process for the determination of the issues raised.

(b) *Ong Yok Chu & Anor v Yong Teck Fong & Anor* [1960] 1 MLJ 292 where it was held, inter alia, that it is contrary to all decided authorities to try disputed issues of fact on an originating summons.

[170] The first respondent however contended that the appellant should have applied to convert the originating summons to a writ action and that since he failed to do so, it was too late for him to raise the matter now. We do not think that in all the circumstances of this case, converting the originating summons to a writ action was a viable option. There was to the first respondent's knowledge already an ongoing trial in the Teluk Intan Sessions Court when it filed the application under s 96(3) of the RTA.

[171] The trial in the Teluk Intan Sessions Court was to determine, amongst others, if the third respondent was involved in the accident and if so whether he was negligent in causing the accident. To convert the originating summons to a writ action would unnecessarily prolong the matter. In saying this, we must not be understood to mean that in an application under s 96(3) the insurer is at liberty to apply for the application to be converted to a writ action if

otherwise the action is well within the jurisdiction of the subordinate courts, in this case the Teluk Intan Sessions Court.

[172] For all the reasons aforesaid, leave question 1 is answered in the affirmative. Leave question 2 is also answered in the affirmative to prevent two courts of competent jurisdiction from making conflicting findings of fact on the same issue. Evidence of the alleged non-involvement of the third respondent in the accident must be adduced at the trial to prevent duplicity of proceedings. As for leave question 3, the answer must likewise be in the affirmative as a s 96(3) application is only for determining issues of voidness and unenforceability of an insurance contract and not to determine core issues in the tort of negligence.

APPEAL NO 5: MALAYSIAN MOTOR INSURANCE POOL V AQMAL BIN DAKHIRRUDDIN

[173] There were seven leave questions posed for our determination in this appeal and they are as follows:

Leave question 1:

> Is the concept of transfer of interest under Insurance Law similar to ownership being passed to the possessor/buyer under section 13 of the Road Transport Act 1987 (RTA) notwithstanding the registration card remaining in the name of the original owner?

Leave question 2:

> Are the English Common Law cases, starting with *Peters v General Accident & Life Assurance Corpn Ltd* [1937] 4 All ER 628 as applied in *New India Assurance Co Ltd v Simirah* [1966] 2 MLJ 1 (FC) still good law in the light of the interpretation given by the Court of Appeal to the doctrine of *uberrimae fidel* under Schedule 9 of the Financial Services Act (FSA) 2013?

Leave question 3:

> Is the definition of 'insurer concerned' of a vehicle bound by the letter dated 18/1/1985 issued by the Motor Insurance Bureau given that the PRINCIPAL AGREEMENT dated 1968 has been replaced by the SUBSTITUTED AGREEMENT dated 1992?

Leave question 4:

> 'Whether the principle enunciated in the Federal Court case of *Nanyang Insurance Co Ltd v Salbiah & Anor* [1967] 1 MLJ 94 (FC), is good law in the determination of transfer of interest in motor vehicle ie whether a transferor of possession of a motor vehicle by sale retains an interest in a motor vehicle until full purchase price has been effected by the transferee?

Leave question 5:

> Whether breach of a policy condition by an insured/tortfeasor ie

misrepresentation, failure to inform change of ownership or that the contract of insurance between the insurer and the insured based on the principle of 'uberrimae fidei' does not entitle the insurer to deny liability to an innocent/third party (victim of bodily injury/death) by virtue of the statutory compulsory requirement under section 91(1)(b) read together with section 94 and 95 Road Transport Act 1987 ('RTA').

Leave question 6:

Whether the RTA in particular provisions under Part IV namely section 89, 90, 91, 94 and 95 to 107 of RTA provide statutory protection to road victims (who are innocent parties) under the insurance policy terms?

Leave question 7:

When facts are being disputed between the parties and contradicting to the contemporaneous documents, whether the mode of Originating Summons is proper to dispose an issue relating to the transfer on interest of a motor vehicle?

[174] Briefly the facts are these. On 6 September 2014, the respondent was riding motorcycle registration No BLB 6002 ('the motorcycle') with his friend Muhammad Arif bin Ahmad Azhar riding pillion from Parkland heading towards Telok Panglima Garang. When they reached Persiaran Tengku Ampuan Rahimah, Klang, they were proceeding straight ahead when motorcar registration No BFU 2275 ('the car') driven by one Fovez Ahmad without any warning and without any signal switched direction from left to right, causing a collision between the car and the motorcycle, resulting in serious injuries to the respondent and his friend Muhammad Arif bin Ahmad Azhar.

[175] At the time of the accident, the car driven by Fovez was registered in the name of one Azhar bin Ahmad ('the insured') and insured by the appellant for the period from 30 April 2014 to 29 April 2015. The insured had, in September 2011 sold the car to one En Din ('Din'), a used car dealer for RM11,000 who subsequently sold the car to one Sufiah Savithri bt Abdullah ('Sufiah') sometime in June 2014 for RM22,000.

[176] Civil proceedings were instituted by the respondent in the Sessions Court at Sepang against the driver and the insured for causing the accident. The appellant through its solicitors Messrs Murali B Pillai & Associates filed its statement of defence dated 5 May 2016 on behalf of the insured. The proceedings at the Sepang Sessions Court was fixed for trial on 23 November 2016 and subsequently postponed to 25 November 2017 and 27 November 2017. The trial is now stayed pending the outcome of the present appeal by the appellant.

[177] Subsequently the appellant appointed another firm of solicitors, namely Messrs Silva Velu & Co to act for it, who then served on the respondent

A the cause papers for the s 96(3) application, seeking for a declaration that the insurance policy was void and unenforceable against it. The appellant was also seeking to avoid any liability to cover any judgment sum awarded to the respondent by the Sepang Sessions Court.

B **[178]** The appellant's case was that the insurance policy has been rendered void by reason of the sale of the car to Din by the insured in September 2011. It was however not disputed by the appellant that the second purchaser Sufiah only registered the car in her name on 15 January 2015 upon paying the full C purchase price.

[179] Going by the timeline, it is clear that the car was still registered in the insured's name at the time of the accident on 6 September 2014. He was therefore deemed to be the 'owner' of the car at the material time (s 109(1) of D the RTA).

[180] The appellant's application under s 96(3) of the RTA was allowed by the Shah Alam High Court, inter alia, on the following grounds:

E (a) that the insurance company was entitled to avoid or cancel or may avoid or cancel a policy of insurance upon such event arising as stated in the RTA;

(b) that since the originating summons was not opposed by the insured and in fact admitted in the statutory declaration pertaining to the sale of the F motorcar without notifying the appellant, there was a breach of the doctrine of *uberrimae fidei* and that the failure to make such disclosure entitled the appellant to obtain a declaration as prayed for in the originating summons;

G (c) that the Court of Appeal judgment in *Zainudin Mat Isa & Anor v The Pacific Insurance Berhad & Ors* [2017] 1 LNS 1979 is distinguishable on the ground that the declaration sought for in that case was not consistent with the registration card of the motorcar and hence there was insufficient proof of the sale of the car;

H (d) that the respondent himself had no knowledge of the sale of the car to be able to refute the sale to Din and subsequently to Sufiah;

(e) that despite the tortious action instituted in the sessions court against the insured and Fovez, Sufiah had proceeded to register the transfer to her I name on 15 January 2015. This meant that Sufiah admitted that Fovez had driven the car at the time of the accident and that the appellant had no knowledge of the sale transaction nor the loan of the car when the car was involved in the accident;

(f) that since it was a case of 'sambung bayar', the fact of the failure to disclose a copy of the registration card as requested by the respondent's solicitors was not fatal and did not attract the adverse inference under s 114(g) of the Evidence Act 1950;

(g) that the respondent ought to know that the registration card should have been in the possession of the finance company and not with the appellant;

(h) that Fovez was not authorized to drive the car by the insured;

(i) that based on the cases of *Peters v General Accident & Life Assurance Corpn Ltd* [1937] 4 All ER 628; *New India Assurance Co Ltd v Simirah* [1966] 2 MLJ 1; *Roslan bin Abdullah v New Zealand Insurance Company Ltd* [1981]2 MLJ 324; [1981] 1 LNS 40; [1981] 1 MLRA 445 and *Kurnia Insurance (Malaysia) Berhad v Personal Representative of Zenol Saad & Ors* [2013] MLJU 1653; [2013] 1 LNS 239, the policy insurance had lapsed by reason of the sale of the motorcar.

[181] The decision was reversed by the Court of Appeal, inter alia, on the following grounds:

(a) that the evidence of statutory declarations relied on by the appellant was insufficient as the facts were disputed and contradictory to the contemporaneous documents. There was no explanation of the circumstances and the reason as to why the vehicle belonged to Sufiah but remains registered in the name of the insured;

(b) that the determination of 'transfer of interest' from the insured to Din and subsequently to Sufiah ought to give consideration to the compliance of s 13 of the RTA and in this case there was a breach of the provision;

(c) that s 109 of the RTA provides that the registered owner of a motor vehicle shall be deemed to be the owner of the motor vehicle for the purpose of the present case;

(d) that applying *Nanyang Insurance Co Ltd v Salbiah & Anor* [1967] 1 MLJ 94 (FC), the insured retained an interest in the motor vehicle until the full purchase price was effected on 15 January 2015 by Sufiah after the accident on 6 September 2014;

(e) that the appellant cannot deny liability by virtue of the statutory compulsory requirement under s 91(1)(b) read with ss 94 and 95 of the RTA; and

(f) that there is a letter dated 18 January 1985 from the Motor Insurance Bureau (MIB) which lays down that all accidents occurring after 30 August 1984 involving a 'transfer of interest claims' would become the liability of the insurance companies concerned.

[182] Except for leave question 3, the issues raised in leave questions 1, 2, 4, 5, 6 and 7 are in substance similar to the issues raised in the corresponding leave questions in Appeal No 1 (Amgeneral Insurance), Appeal No 2 (Mohamad Rafiq), and Appeal No 4 (Mohamad Zulkarnain). Therefore the answers to leave questions 1, 2, 4, 5, 6 and 7 must correspondingly be the same as our answers to the corresponding leave questions in those three appeals and for the same reasons.

[183] Leave question 3 is reproduced again below:

> Is the definition of 'insurer concerned' of a vehicle bound by the letter dated 18/1/1985 issued by the Motor Insurance Bureau given that the PRINCIPAL AGREEMENT dated 1968 has been replaced by the SUBSTITUTED AGREEMENT dated 1992?

[184] The respondent's contention was that the appellant is bound by the Motor Insurance Bureau (MIB) guidelines *vide* letter dated 18 January 1985 which makes insurers liable under the policy for motor vehicles. According to the respondent the appellant is therefore liable under the insurance policy for the car BFU 2275 as all insurers for motor insurance are signatories to the Substituted Domestic Agreement with the MIB guidelines. We agree.

[185] The effect of the MIB guidelines was considered in *Mohd Salleh Kasim v Taisho Marine & Fire Insurance Co Ltd & Anor* [1998] MLJU 665; [1999] 5 CLJ 302 where it was held, on the facts of the case, that in the event of a transfer of ownership of the motorcycle, the insurer (first defendant) was still liable to the plaintiff for the simple reason that under the memorandum, to which the first defendant was a signatory, the first defendant had agreed to be liable to third parties for any claim arising out of a road accident after 30 August 1984 involving any vehicle insured by it even though the vehicle may have been transferred from the insured to some other person.

[186] In *Hameed Jagubar bin Syed Ahmad v Pacific & Orient Insurance Co Bhd* [2017] 6 MLJ 618; [2017] 10 CLJ 278 the Court of Appeal in a unanimous decision observed as follows:

> [38] In this regard, it must be noted that although the insured was guilty of breach of utmost good faith, the intervener was an innocent third party. As motor insurance is compulsory by law, the intention of Parliament is to provide compensation by insurance companies especially to innocent and blameless third parties who suffer injury and damage. It is a statutory remedy and there must be some assurance of payment as otherwise the whole purpose of such insurance scheme will seem illusory.
>
> [39] This was fortified further by the establishment of the Motor Insurer's Bureau of Malaysia ('MIB') in 1968 as a form of social justice to victims of road accidents who

failed to obtain compensation. It was set up on 15 January 1968 through an agreement between MIB and the Minister of Transport and followed by an agreement by each of the insurance companies transacting compulsory vehicle insurance business who would fund the MIB.

[40] This was superseded by a new agreement between MIB and the Minister of Transport on 9 January 1992 which was followed by a second agreement between MIB and the insurance companies which became operative on 1 January 1992. The Malaysian MIB Agreement, which was inspired by and fashioned according to the UK MIB Agreement of 1946, later spawned the Singapore MIB Agreement of 1975 (see S Santhana Dass, *The Law of Motor Insurance,* (2010), Marsden Law Book, Kuala Lumpur).

[41] Significantly, the MIB Agreement also found its way into the statute books in the form of s 89 of the RTA which defines 'authorized insurer' as 'a person lawfully carrying on motor vehicle business in Malaysia who is a member of the Motor Insurer's Bureau'. In the same section it is also set out that 'Motor Insurer's Bureau' means the Motor Insurers' Bureau which has executed an agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or of effective insurance.

[187] Thus, even assuming for a moment that there was a breach of policy conditions by the insured for failing to inform the appellant of the sale of the car, the appellant cannot deny liability by virtue of the statutory requirement under s 91(1)(b) read with ss 94 and 95 of the RTA. In any event, the appellant as insurer is bound by the MIB guidelines vide letter dated 18 January 1985.

[188] The Court of Appeal was therefore not wrong in referring to the MIB guidelines as an additional issue in determining the liability of an insurer to a third party claim for bodily injury or death.

[189] Accordingly, our answer to leave question 3 is in the affirmative, that is to say, the definition of 'insurer concerned' of a vehicle is bound by the letter dated 18 January 1985 issued by the MIB given that the PRINCIPAL AGREEMENT dated 1968 has been replaced by the SUBSTITUTED AGREEMENT dated 1992.

APPEAL NO 6: PACIFIC & ORIENT INSURANCE CO BHD V YEAP TICK IN

[190] For this appeal the leave questions are as follows:

Leave question 1:

When the High Court has found as a fact that the third party claimant (the Respondent) had made 2 separate applications to set aside the declaratory order obtained by the insurer against its insured and when both the said applications

had been dismissed by 2 different High Courts and when the Defence filed by the 3rd party Claimant in the suit filed by the insurers for the injunction relied on the same facts on which the 2 applications were dismissed and when there was no further appeal against the dismissals of the third party's 2 applications to the Court of Appeal, was the High Court entitled in law to grant a permanent injunction against the 3rd party Claimant until he obtained Judgment against the insurer;

Leave question 2:

Even though the High Court, having found that the insurer had not made out a case for malicious prosecution and abuse of process, but based on the imminent threat by the third party Claimant to execute against the insurer a public listed company, without first obtaining Judgment against the insurer, was the High Court not entitled to grant the permanent injunction (quia timet) against the third party Claimant, until he obtained the Judgment against the insurer.

[191] The appeal is against the decision of the Court of Appeal dated 11 September 2019 reversing the decision of the High Court dated 1 June 2017 to grant a permanent injunction against the respondent by injuncting him from applying to enforce a judgment that he obtained from the Shah Alam Sessions Court against the insured without first obtaining judgment against the appellant as the insurer by way of recovery proceedings.

[192] The appellant's contention was that the respondent as a third party claimant had no automatic right to issue a demand notice against it just because he had obtained judgment against the insured from the trial court. It was argued that the respondent must also obtain judgment against the appellant as the insurer before he could proceed with execution proceedings.

[193] The facts leading to the present appeal are as follows. The respondent filed his personal injuries claim in the Shah Alam Sessions Court against one Muhammad Salleh bin Abdullah (the insured) following a road accident on 13 June 2012. The insured's motorcycle bearing registration No BKU 1790 ('the motorcycle') which was ridden solo by his friend and colleague one Azman bin Kamaruddin had hit the respondent's bicycle, thereby causing him severe injuries. At all material times the motorcycle was insured by the appellant.

[194] Notice of proceedings pursuant to s 92(2)(a) of the RTA was issued by the respondent's solicitors to the appellant as the insurer of the motorcycle. Upon receipt of the notice, the appellant appointed Jaya Adjusters Sdn Bhd ('the adjusters') to investigate the case.

[195] The insured informed the adjusters that he did not ride the motorcycle on the date of the accident, ie on 13 June 2012 and was not

involved in any accident with the respondent. The insured then affirmed a statutory declaration dated 7 October 2014 to that effect before a Commissioner for Oaths.

[196] On the basis of the statutory declaration, the appellant filed an originating summons in the High Court at Kuala Lumpur against its insured on 21 November 2014 to declare the policy void and unenforceable under s 96(3) of the RTA and it succeeded. On 7 January 2015, the High Court granted the order sought for by the appellant, despite the fact that neither the cause papers nor the notice of application were served on the respondent or his solicitors.

[197] After obtaining the declaratory order, the appellant instructed its solicitors defending the insured in the Shah Alam Sessions Court action to discharge themselves from further acting for the insured for the reason that any continued defence of the insured after obtaining the declaratory order from the High Court would be construed as a waiver by the insured whom it represented.

[198] The appellant only resumed its defence of the insured after the decision of the Court of Appeal in *AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli* [2016] 1 MLJ 818, which held that notwithstanding the fact that the insurer had obtained a declaratory order under s 96(3) of the RTA, the insurer could continue defending the insured since there is 'a commonality in interest' in the insurer continuing with the defence to mitigate on both liability and quantum.

[199] In the meantime, the trial in the Shah Alam Sessions Court proceeded, and on 28 March 2016 the respondent obtained a default judgment against the insured for general and special damages in the sum of RM177,657.50 with interest and costs of RM14,633. To date this judgment of the Shah Alam Sessions Court has not been set aside nor appealed against.

[200] What transpired in the Shah Alam Sessions Court earlier was that four witnesses for the respondent and one for the insured had given evidence and the matter was at the submissions stage when the insured's solicitors forwarded the declaratory order dated 7 January 2015 obtained by the appellant from the Kuala Lumpur High Court to the respondent's solicitors.

[201] The respondent by notice of application to the Kuala Lumpur High Court dated 10 March 2015 applied to intervene in the proceedings and to set aside the declaratory order obtained by the appellant dated 7 January 2015. The application was dismissed by the High Court on 2 June 2015.

[202] The respondent did not appeal against the decision but filed another application in the Kuala Lumpur High Court on 26 October 2017 in which the respondent again applied for an order to set aside the s 96(3) declaratory order dated 7 January 2015 obtained by the appellant against the insured.

[203] On being served with the application, the appellant filed an application dated 9 November 2017 to strike off the respondent's application on the basis that the application was caught by the principle of res judicata and issue estoppel because the reasons set out in the supporting affidavits for both applications raised the same issue. The High Court found favour with the appellant's argument and struck out the respondent's application. The respondent filed an appeal against the decision but subsequently filed a notice of discontinuance.

[204] In the meantime, while the parties were waiting for the decision of the High Court fixed on 20 March 2018, the respondent through Messrs Manikam Aviadar & Co issued a notice dated 26 February 2018 to the appellant demanding payment of the judgment sum obtained by the respondent from the Shah Alam Sessions Court two years earlier on 28 March 2016 and threatened to enforce the judgment against the appellant through proceedings 'deemed fit and proper and in a manner or method and date, at our discretion without further notice to you'. The appellant took this as a threat to enforce execution of the Shah Alam Sessions Court judgment by writ of seizure and sale.

[205] The appellant's response to the notice of demand was to file an application in the Kuala Lumpur High Court for the following orders:

(a) an injunction to restrain the first respondent from executing the Shah Alam Sessions Court judgment until the hearing and disposal of the application for an interim injunction and the writ;

(b) damages for malicious prosecution;

(c) damages for malicious prosecution;

(d) damages for abuse of process;

(e) costs; and

(f) other relief.

[206] It was the appellant's contention that by threatening to commence execution proceedings when no judgment had been obtained against it, the respondent was abusing the court process, and by threatening to execute the judgment obtained by the respondent from the Shah Alam Sessions Court, the respondent was maliciously prosecuting the appellant without first establishing

that the appellant as the insurer was liable to the respondent in damages and this was a good enough reason for the High Court to grant a *quia timet* injunction.

[207] In answer to the argument, the respondent contended that under s 96(1) of the RTA and the decisions of the Court of Appeal in *Rasip bin Hamsudi*, *Pacific & Orient Insurance Co Berhad v Kumari a/p Nadason and Anor* (Court of Appeal) (Civil No W-02(IM)(NCVC)-2433–11 of 2013) and *Muniammah Muniandy,* he was entitled to claim payment from the appellant.

[208] In its counter argument the appellant submitted that s 96(1) is not a blanket provision giving the respondent as the third party claimant an absolute right to payment where judgment had been entered against the insured and that payment of the judgment sum by the insurer is subject to the exclusion of the insurer's liability under sub-s (2) and (3). This according to counsel had been endorsed by the Court of Appeal in *Kamacheh a/p Karuppen.*

[209] The High Court decided in favour of the appellant (in part) by making the following orders:

(a) the prayer for permanent injunction was allowed;

(b) damages for malicious prosecution was dismissed;

(c) damages for abuse of process was dismissed; and

(d) costs of RM5,000.

[210] However the learned judge in his grounds of judgment did not explain why he ordered for a permanent injunction when no prayer for a permanent injunction was sought for by the appellant.

What the appellant sought for was an interlocutory injunction until the disposal of the suit.

[211] The respondent mounted a successful appeal to the Court of Appeal against the decision of the High Court, hence the present appeal by the appellant. In allowing the respondent's appeal, the Court of Appeal had held that:

(a) the learned High Court judge had no jurisdiction to grant any relief to the appellant as it failed to establish any cause of action whether in the form of damages or other reliefs; and

(b) there was no prayer for a perpetual injunction as what was sought was only an interim injunction pending disposal of the suit.

[212] It was submitted by learned counsel for the appellant that the Court of Appeal was wrong in not deciding on the issue of res judicata and issue estoppel. Reliance was placed on *Pernec Corp Bhd v A & AT Advanced Power Systems Sdn Bhd* [2013] 4 MLJ 719 for the proposition that where the trial judge had decided on a matter without judicial appreciation of the evidence, an appellate court's interference is warranted.

[213] The contention was that even though the appellant's claim for malicious prosecution and abuse of process was dismissed, the High Court was correct in granting the *quia timet* injunction, citing *PPES Resorts Sdn Bhd v Keruntum Sdn Bhd* [1990] 1 MLJ 436 and *Redland Bricks Ltd v Morris and another* [1970] AC 652 where the House of Lords held that a *quia timet* injunction would be given 'to prevent an apprehended legal wrong, though none has accrued at present, and the suppliant for such an injunction is without any remedy at law'.

[214] For this reason it was submitted that the Court of Appeal erred in failing to consider that this was an appropriate case for the grant of a *quia timet* injunction until the respondent obtained judgment against the appellant as the insurer. The appellant however proffered no answer as to why a permanent injunction was granted by the High Court instead of an interim injunction.

[215] As we see it, the issues raised in both leave questions boils down to the question whether the appellant is bound by s 96(1) of the RTA to pay the judgment sum obtained by the respondent against the insured from the Shah Alam Sessions Court, and if so whether the respondent must first obtain another judgment against the appellant in the absence of which the appellant would be entitled to a permanent injunction to stop the respondent from enforcing the judgment that he had obtained against the insured from the Shah Alam Sessions Court.

[216] To put the matter in the right perspective, it needs to be pointed out that the question of the appellant's entitlement to a permanent injunction in the manner it is raised in the two leave questions does not arise as it was not even sought for by the appellant. The two leave questions are therefore misconceived as they are based on an order that was erroneously made by the High Court. The court has no jurisdiction to make an order that is not sought for by the litigant.

[217] There can be no dispute that the default judgment obtained by the respondent from the Shah Alam Sessions Court was a regular and enforceable judgment, which has not been set aside nor appealed against. Under s 96(1) of the RTA the appellant is bound to pay the judgment sum to the respondent. The appellant can only refuse to pay the judgment sum in the following

circumstances, none of which applies in its favour:

(a) if no notice of proceedings under s 96(2) had been given by the respondent;

(b) if policy for the vehicle had been cancelled prior to the accident;

(c) if the judgment was not served on the appellant; and

(d) if there was a stay pending appeal or if the judgment had been set aside, irregular or that the trial court had no jurisdiction to pass the judgment.

[218] We have in Appeal No 2 decided that there is no necessity for a third party claimant (in this case the respondent) who had obtained judgment from the trial court against the insured to obtain another judgment against the insurer (in this case the appellant) before the third party claimant could enforce the trial court's judgment (in this case the Shah Alam Sessions Court judgment) against the insured. Therefore the question of the appellant's entitlement to an injunction, *quia timet* or permanent against the respondent does not arise. The two leave questions must therefore be answered in the negative.

APPEAL NO 7: PACIFIC & ORIENT INSURANCE CO BHD V ARNANDAN A/L SORIA DEMADU

[219] The leave questions for this appeal are as follows:

Leave question 1:

> When an insurer proceeds to obtain a declaration pursuant to section 96(3) of the Road Transport Act 1987 to declare the policy of insurance issued to its insured void and unenforceable, is the proviso to section 96(3) to be given the interpretation as expounded by the High Court in *Pacific & Orient Insurance Co Berhad v Azhar bin Azizan* [2015] 10 MLJ 532 and upheld by the Court of Appeal and the Federal Court, or is the interpretation to the said proviso is as expounded by the Court of Appeal in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya binti Asbam) & Ors* [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659 (CA) which refused to follow the decision in *Pacific & Oriental Insurance Co Bhd v Azhar bin Azizan (Mohd Ashraf Yusoff, as intervener)* [2015] 10 MLJ 532.

Leave question 2:

> Is an insurer bound to serve the cause papers relating to the application for a declaration pursuant to section 96(3) of the Road Transport Act 1987 upon the third party claimant, every time that the insurer finds it necessary to make the application, or is the insurer only bound to serve the said cause papers relating to the application for a declaration pursuant to section 96(3) of the Road Transport Act 1987 upon the third party claimant, only when the third party claimant had already obtained judgment against the insured/rider in the Magistrate/Sessions

A Court since by obtaining the said judgment against the insured/rider, the third party claimant has then obtained a legal interest as against the insurer.

Leave question 3:

If a third party claimant only derives a legal interest against an insurer after he had obtained a judgment for damages against an insured, therefore does the insurer have a legal duty to serve its application for a declaration which is only binding between the insurer and the insured, upon the third party claimant even before the third party claimant obtains judgment against the insured.

Leave question 4:

Is the Court of Appeal correct in law in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya binti Asbam) & Ors* [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659 (CA) when it failed/refused to refer to the decision of another Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 (CA) (although referred to it), and which judgment in *Letchumanan* held that whilst an insurer has a right to disclaim liability as against its insured for breach of policy considerations, the third party claimant's rights as against the said insurer is protected by the third party claimant's rights to file the recovery proceedings for the damages awarded against the said insurer, based on the third party claimant's vested rights to section 96(1) of the Road Transport Act 1987.

Leave question 5:

Is the Court of Appeal in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya binti Asbam) & Ors* [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659 (CA) correct in law in failing to accept and adopt the decision of another Court of Appeal in *Pacific & Orient Insurance Co Berhad v Kumari a/p Nadason and Anor* [2014] MLRAU 535 (CA) which held that the declaratory order is only effective and binding between the insurer and the insured and that since the cause papers relating to the application for a declaration were not served on the third party claimant, the declaratory order was not binding on the third party claimant.

Leave question 6:

Is the Court of Appeal correct in law in accepting the decision of the High Court which held that insurance companies cannot obtain a declaration pursuant to section 96(3) RTA 1987 against their own insured without first giving notice to the plaintiff since this would give the insurer the right to contest their liability towards any third party claim.

[220] Although the six questions are not similar word for word with the leave questions posed in Appeal No 2 (which involves the same insurance company), the issues of law raised are essentially the same. The salient facts are

as follows. The respondent Arnandan a/l Soria Demadu filed a civil action in the Sessions Court at Kulim, Kedah against one Kevin Raj a/l Neelakandan ('Kevin Raj') as the rider of motorcycle registration No PGG 9569 and against his (respondent) own sister Sandhi a/p Soria Demadu as the insured and owner of the motorcycle. The appellant was the insurer of the motorcycle at the time of the accident.

[221] Upon receipt of the notice of commencement of proceedings, the appellant retained the services of Jaya Adjusters Sdn Bhd ('the adjusters') to investigate the case and to record a statement from the insured to find out how the accident happened.

[222] The rider (Kevin Raj) informed the adjusters that he was not involved in the accident with the respondent and affirmed a statutory declaration dated 15 October 2015 setting out the alleged fraud committed by the respondent.

[223] Based on the adjusters' report and the statutory declaration of Kevin Raj, the appellant applied by way of originating summons under s 96(3) of the RTA to declare the policy issued to the insured void and unenforceable on the ground of fraud. The application was allowed by the High Court on 28 April 2016.

[224] After obtaining the declaratory order, the appellant instructed its solicitors to discharge themselves from further defending the rider and the insured in the Kulim Sessions Court for the reason that having obtained the declaratory order against the insured, any continued defence of the rider and the insured at the sessions court trial would be construed as a waiver of the declaratory order.

[225] It was only after the decision of the Court of Appeal in *Iskandar bin Mohd Nuli* that the appellant continued to defend the insured, which proceedings in the Kulim Sessions Court then proceeded with the participation of the solicitors appointed by the appellant defending the rider and the insured.

[226] At the conclusion of the trial in the Kulim Sessions Court on 29 November 2016, which was exactly seven months after the appellant obtained the declaratory order from the High Court on 28 April 2016, judgment was entered in favour of the respondent, which means liability was established against both the rider (Kevin Raj) and the owner (the insured) of the motorcycle.

[227] The appellant refused to pay the judgment sum on the basis of the declaratory order it had earlier obtained from the High Court on 28 April 2016, which declared the insurance policy to be void and unenforceable against

it. Faced with the appellant's refusal to pay, the respondent applied to the Alor Setar High Court by way of an originating summons for the following orders, amongst others:

(a) that pursuant to s 96(3) of the RTA the appellant had no right to obtain any benefit from the declaratory order dated 28 April 2016 which the appellant had obtained from the High Court and following therefore the said order be declared void and unenforceable and not binding on the respondent; and

(b) that based on s 96(1) of the RTA the appellant as the insurer of the motorcycle ought to pay the respondent the judgment sum obtained at the Kulim Sessions Court on 29 November 2016 against the rider of the motorcycle.

[228] In opposing the application, the appellant in its reply through the affidavit of Kevin Raj affirmed as follows:

(a) that the owner of the motorcycle, namely Sandhi is the sister of the respondent;

(b) that on the night of the accident, ie on 21 March 2014, he was approached by a lawyer's tout to help him lodge a false police report at the Kulim traffic police station to state in the report that he was involved in a motor accident involving motorcycle registration No PDY 5179 ridden by the respondent;

(c) the said lawyer's tout requested him to lodge the false report because his friend (the respondent) had in fact fallen on his own (*terbabas sendiri*) and as a result had injured himself and intended to make this claim against the appellant and requested him to admit that he was riding the motorcycle and that he was involved in the accident with the respondent riding motorcycle No PDY 5179; and

(d) initialy he was not agreeable to the suggestion by the tout but after being persuaded by and upon insistence (*dorongan dan desakan*) of the tout and being sympathethic towards the injured respondent, he agreed to lodge the false police report on 22 March 2014 and apologized to the appellant for the inconvenience caused.

[229] What is clear from Kevin Raj's statutory declaration, if true, is that the respondent's motorcycle was not involved in the accident on 21 March 2014 and therefore his claim for damages against the rider (Kevin Raj) and the insured in the Kulim Sessions Court was false.

[230] Clearly therefore, the appellant's refusal to pay the judgment sum was grounded on its allegation that the respondent, who is the insured's brother,

had made a false insurance claim. It was also the appellant's case that the insured herself had breached the principle of *uberrimae fidei* by failing to tell the truth, relying on the decision of this court in *Hameed Jagubar bin Syed Ahmad.*

[231] It was argued that since the insured has to date failed to lodge any police report to deny the involvement of her motorcycle in the accident and to deny the false report lodged by her brother and to withdraw the said false report, and also failing to notify the appellant that this was a false claim based on the rider's statutory declaration, the insured was also deemed to have conspired with her brother to lodge the false police report against her insurer, the appellant

[232] In our view, the issue of fraud raised by the appellant must be considered in the light of the decision of the Kulim Sessions Court which found liability to have been established against the rider Kevin Raj.

[233] The decision of the Kulim Sessions Court to find Kevin Raj liable for the accident means that fraud has not been established against the respondent, contrary to the claim by the appellant through Kevin Raj's statutory declaration. It is inconceivable that the Kulim Sessions Court would have decided in favour of the respondent on the issue of liability if the learned judge had found the respondent to be lying on the involvement of Kevin Raj and the motorcycle in the accident. This finding of fact must be accepted as the truth as it was not appealed against.

[234] We have dealt with a similar situation when dealing with Appeal No 4. What we said there applies mutatis mutandis to the facts of the present case. The same goes with the other leave questions, which we have dealt with when dealing with Appeal No 2. In fact leave questions 3 and 5 acknowledge that the declaration under s 96(3) of the RTA is only binding between the insurer and the insured and not on the respondent as a third party claimant. We accept that as a correct proposition of law. The answers to the six leave questions are therefore the same as our answers to the corresponding leave questions in Appeals No 2 and No 4.

APPEAL NO 8: PACIFIC & ORIENT INSURANCE CO BHD V NAVIN NAICKER A/L VIJAYAN & ANOR

[235] The leave questions are:

Leave question 1:

> When the KL Trial Judge had found as a fact that based on the evidence led a conspiracy to defraud the insurer had been made out as against the second and

A the third Respondent being the insured and the insured rider, and that the insurer possessed a defence on the merits of the fraud on the part of the insured/rider, was the Court of Appeal correct in law in rejecting the insurer's application for a declaration to declare the policy void and unenforceable.

Leave question 2:

B When the KL Trial Judge had found as a fact that the version of events as put forth by the insured rider as to how the accident occurred as being inherently incredible and inconsistent even with the testimony of the third party claimant, was the Court of Appeal correct in law in rejecting the insurer's application for a declaration to declare the policy void and unenforceable.

C Leave question 3:

Is it correct in law for the High Court to hold that once judgment had been entered against its insurers for damages, an insurer is precluded, pursuant to section 96(3) Road Transport Act 1987 from thereafter filing proceeding to D declare the policy issued to the insured void and unenforceable.

Leave question 4:

Can a Court ignore the proviso to section 96(3) of the Road Transport Act 1987 which allowed the insurer the right to file an application to declare the policy E void and unenforceable by giving seven (7) days notice before commencing the application to declare the policy void and unenforceable to the third party claimant, because having obtained judgment against the insured, the third party claimant has since obtained legal interest.

Leave question 5:

F When the insured makes a statutory declaration denying that he had lent his motorcycle to the rider at the material time nor that he knew the rider at the material time and subsequently makes a second statutory declaration 1 month later in which he denies the contents of the first statutory declaration and when cogent evidence led by the Adjuster who took him before the Commissioner to G affirm the first SD, showed clearly that the first statutory declaration was made willingly and voluntarily, and that the second statutory declaration was affirmed to defraud the insurer, was the Court of Appeal correct in law in refusing to grant the declaratory order to declare the policy void and unenforceable on the basis of fraud on the part of the insured rider.

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[236] All five questions, in particular questions 1, 2, and 5 are fact centric while at the same time implying that the insurer is entitled to a declaratory order under s 96(3) of the RTA irrespective of the circumstances surrounding the grant of the order. As for leave questions 3 and 4, we have dealt with similar I issues when dealing with Appeal No 2 and as such we do not propose to repeat what we have said there save to say that it applies to the present appeal.

[237] Given the way the five questions are crafted, it is necessary for us to set out the facts in some detail to provide context. On 13 April 2014, one Shahrul

Iman bin Abdullah (first respondent) was riding motorcycle registration No BLU 3306 when he was involved in a road accident with one Yahya bin Yacob (third respondent) along the Kepong-Sungai Buloh Road. The third respondent was riding motorcycle registration No BLQ 1049 ('the motorcycle') belonging to Navin Naicker a/l Vijayan (second respondent) which was insured by the appellant at the time of the accident.

[238] The first respondent (Shahrul Iman bin Abdullah) is no longer a party to this appeal as an earlier panel of this court had, on 30 March 2021, refused leave to the appellant to bring this appeal against him. Consequently, at the commencement of the hearing before us, the appellant applied to withdraw its appeal against the first respondent and we allowed the application. We shall henceforth refer to the first respondent as 'the claimant'.

[239] The narrative began in 2015 when the claimant filed a claim for loss and damages against the second and third respondents in the Sessions Court at Shah Alam for the accident which caused him grevious personal injuries. On receiving the notice of commencement of the Shah Alam Sessions Court action, the appellant engaged the services of Jaya Adjusters Sdn Bhd ('the adjusters') to investigate the case and to ascertain how the accident occurred.

[240] The adjusters' report was made available on 23 March 2016, two years after the accident, in which the insured (second respondent) informed the adjusters that his motorcycle was not involved in the accident with the claimant on 13 April 2014 and affirmed a statutory declaration to that effect before a commissioner for oaths on 17 February 2016.

[241] Subsequently the second respondent affirmed a second statutory declaration on 25 March 2016 to deny the contents of his first statutory declaration dated 17 February 2016. He now confirmed that his motorcycle was involved in the accident with the claimant on 13 April 2014. Thus, in less than two months after making his first statutory declaration, the second respondent had a different story to tell.

[242] Armed with the statutory declarations, the appellant applied under s 96(3) of the RTA to the Kuala Lumpur High Court to declare the insurance policy issued to the second respondent void and unenforceable. On 28 July 2016 the learned Judicial Commissioner of the Kuala Lumpur High Court granted the declaratory order sought for by the appellant.

[243] However, nothing was done by the appellant to stay the proceedings in the Shah Alam Sessions Court. All it did was to withdraw its legal representation of the insured in the Sessions Court on the basis that any continued defence would have constituted a waiver of the declaratory order it

obtained against the insured (second respondent).

[244] The second respondent successfully appealed to the Court of Appeal against the decision of the Kuala Lumpur High Court dated 28 July 2016. The declaratory order was set aside and the Court of Appeal directed that a writ action be filed by the appellant as there were many disputes of fact which made it improper for the action to have gone by way of originating summons.

[245] By this time however, the Shah Alam Sessions Court had entered judgment against the insured (second respondent) on 16 February 2017. A default judgment for recovery had also been recorded against the appellant on 1 June 2017. These judgments have not been set aside nor appealed against to this day. With regard to the recovery proceedings, the Court of Appeal held that there was nothing fraudulent about the default judgment obtained by the respondent in the recovery action and reproduced the following observations made by the High Court:

> Even if the Sessions Court judgment were to be assailed on the basis that it had been obtained by fraud, no similar allegation can be leveled at the High Court judgment in the recovery proceedings. The insurers sought to impeach not the Sessions Court judgment in the liability action, but rather the High Court judgment in the recovery action.

[246] The appellant's response to the setting aside of the declaratory order it obtained from the Kuala Lumpur High Court on 28 July 2016 was to file two suits in the Kuala Lumpur High Court, namely Suit 121 and Suit 332. Suit 121 was against the second and third respondents on the basis that this was a fraudulent claim and sought for a declaration that the policy issued to the second respondent was void and unenforceable.

[247] Suit 332 on the other hand was against the claimant to impeach the default judgment obtained by him against the appellant from the Shah Alam Sessions Court on 1 June 2017.

[248] Both Suit 121 and Suit 332 were consolidated and heard together before the same High Court judge. After hearing witnesses but without the benefit of the testimony of the Investigation Officer ('IO') and the commissioner for oaths before whom the first and second statutory declarations were affirmed by the second respondent, the learned trial judge decided as follows on 16 August 2019:

(a) in respect of Suit 121, since judgment on liability had been entered against the insured, the appellant was not entitled to a declaration under s 96(3) of the RTA; and

(b) the proper course was for the appellant to apply to set aside the default judgment obtained by the claimant against the second and third respondents from the Shah Alam Sessions Court on 1 June 2017;

[249] However, contrary to his decision as reflected in (a) and (b) above, the learned judge granted an injunction against the claimant, which was to remain in place until either of the following events took place, whichever came earlier:

(a) the dismissal of the application by the appellant to set aside the judgment in default obtained by the claimant in the Shah Alam Sessions Court; and

(b) judgment entered against the appellant on the merits of the recovery action.

[250] The injunction issued against the claimant was in the following terms:

> Perintah injunksi menghalang Defendan, samada melalui dirinya sendiri, atau melalui peguamcaranya, pekerja-pekerjanya, agen-agennya daripada memfailkan sebarang prosiding pelaksanaan melaui Writ Penyitaan dan Penjualan, Petisyen Penggulungan atau sebarang bentuk perlaksanaan lain untuk menguatkuasakan jumlah penghakiman yang diperoiehi melalui Mahkamah Tinggi Shah Alam No: BA-22NCvC-296–05/2017 bertarikh 1.6.2017.

[251] The appellant's Suit 332 was dismissed as the mode of action adopted by the appellant was held to be wrong.

[252] The appellant appealed to the Court of Appeal against the High Court decisions in both Suit 121 and Suit 332. The second and third respondents on their part cross-appealed against the decision in Suit 121 which ordered them to pay costs of RM15,000 to the appellant. What needs to be kept in mind is that at this point in time:

(a) there was a sessions court hearing that was concluded in 2017 and the judgment entered against the insured in that action was never set aside to this day; and

(b) the Court of Appeal had set aside the declaratory order obtained by the appellant on 28 July 2016 and maintained the decision on liability and quantum against the insured (second respondent).

[253] The appeal and cross-appeal by the appellant and the second and third respondents were dismissed by the Court of Appeal, thereby affirming the following decisions of the High Court that:

(a) having regard to the provisions of s 96(3) of the RTA, the insurer could no longer secure a declaration after the claimant had obtained judgment against the insured from the Shah Alam Sessions Court; and

A (b) the declaratory order ought to have been obtained before judgment was obtained by the claimant against the insured on 16 February 2017.

[254] It is clear that the appellant's application to declare the policy void under s 96(3) of the RTA was premised on the insured's (second respondent) claim in his first statutory declaration that the motorcycle was not involved in the accident with the claimant on 13 April 2014, but which he resiled from in his second statutory declaration. The issue was therefore one of fraud allegedly committed by the insured, which is purely a question of fact.

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[255] Having given the matter our careful consideration, we are inclined to agree with learned counsel for the second and third respondents that the finding of fraud by the Kuala Lumpur High Court must be viewed with caution as the evidence of the IO and the commissioner for oaths before whom the second respondent affirmed the two statutory declarations were not before the learned judge for him to make the right decision.

[256] It is clear that the learned judge was made to see only half the evidence as the appellant did not call the other crucial witnesses who gave evidence at the Shah Alam Sessions Court trial, other than failing to call the IO and the commissioner for oaths. The only evidence produced by the appellant before the learned High Court judge was the testimony of the two respondents, the adjusters' report and the statutory declarations.

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[257] The evidence of fraud could and should have been produced at the trial in the Kuala Lumpur High Court but was not made available by the appellant. For this reason alone, we do not think the finding of the High Court, delivered after the Shah Alam Sessions Court had entered judgment against the insured, should be allowed to stand in the way of the unappealed decision of the Shah Alam Sessions Court, which was a decision on liability in the tortious claim action.

[258] Further, there was no explanation given as to why this case was heard in the Kuala Lumpur High Court and no attempt made to revert to the Shah Alam Sessions Court to set aside the judgment entered against the insured (second respondent).

[259] We have mentioned at the start of our deliberation that the five leave questions, particularly questions 1, 2 and 5 are fact centric. The answers to the questions would depend on proved facts where all relevant evidence had been placed before the court. There is absolutely nothing novel in any of the questions that requires determination by this court. As such, we do not find it necessary to answer leave questions 1, 2 and 5.

[260] Even if we were minded to answer the questions, our answers will not be favourable to the appellant as there is a subsisting judgment obtained by the respondent against the insured (second respondent) from the Shah Alam Sessions Court, which has not been set aside. In addition to that, the Court of Appeal had set aside the declaratory order obtained by the appellant from the High Court dated 28 July 2016 and maintained the decision on liability and quantum against the insured (second respondent).

[261] As for leave questions 3 and 4, we have indicated that the answers to the questions are the same as our answers to the corresponding leave questions in Appeal No 2, which coincidentally involved the same insurance company and represented by the same counsel.

[262] To recapitulate and for the avoidance of doubt, our answers to the leave questions for the eight appeals are as follows:

(1) Appeal No 1 (Amgeneral Insurance Bhd v Sa' Amran a/l Atan & 2 Ors): as in para [69] of this judgment;

(2) Appeal No 2 (Pacific & Orient Insurance Co Bhd v Mohamad Rafig Muiz bin Ahmad Hanipah): as in paras [82], [90] and [107] of this judgment;

(3) Appeal No 3 (Jesudas a/l Palanisamy v Pacific & Orient Insurance Co Bhd): as in para [109] of this judgment;

(4) Appeal No 4 (Mohamad Zulkarnain bin Mustafa v Allianz General Insurance Company (M) Bhd & 2 Ors): as in para [172] of this judgment;

(5) Appeal No 5 (Malaysian Motor Insurance Pool v Agmal Dakhiruddin): as in paras [182] and [189] of this judgment

(6) Appeal No 6 (Pacific & Orient Insurance Co Bhd v Yeap Tick In): as in para [218] of this judgment.

(7) Appeal No 7 (Pacific & Orient Insurance Co Bhd v Arnandan a/l Soria Demadu): as in para [234] of this judgment; and

(8) Appeal No 8 (Pacific & Orient Insurance Co Bhd v Navin Naicker & Anor): as in paras [236], [259] and [261] of this judgment.

[263] Before we conclude, perhaps it needs to be said that insurers may complain about the circumstances that make them liable to pay; third party accident victims may complain about being uncompensated. There are two competing interests. Having regard to the object and purpose of the RTA, which is to protect innocent third parties against risks arising out of the use of motor vehicles, we are inclined to the view that the conflicting interests must be

A resolved in favour of the innocent third party accident victims. The following observations by Justice Sarkar of the Supreme Court of India delivering his judgment in *British India General Insurance v Captain Itbar Singh and others* AIR 1959 SC 1331 on 11 May 1959, albeit in the context of a claim against the insured himself who caused the injuries, are worth pondering over:

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> It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on someone and the statute has thought fit that it shall
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> C be borne by the insurer. That also seems to us to be equitable for the loss falls on the insurer in the course of his carrying on his business, a business out of which he makes profit, and he could so arrange his business that in the net result he would never suffer a loss. On the other hand, if the loss fell on the injured person, it would be due to no fault of his; it would have been a loss suffered by him arising out of an
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> D accident in the happening of which he had no hand at all.

[264] In the result, Appeals Nos 1, 2, 5, 6, 7 and 8 are dismissed with costs. Appeals Nos 3 and 4 are allowed with costs.

E **[265]** My learned sisters Justice Hasnah Mohammed Hashim and Justice Rhodzariah Bujang have read these judgments in draft and have agreed with them.

Appeal Nos 1, 2, 5, 6, 7 and 8 dismissed with costs; Appeal Nos 3 and 4 allowed
F *with costs.*

Reported by Dzulqarnain Ab Fatar

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